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No. 16036 ✓

United States
Court of Appeals
for the Ninth Circuit

ROBERT N. CAMERON and JACK CRAW-
FORD, Appellants,
vs.

VANCOUVER PLYWOOD CORPORATION,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

AUG -4 1958

PAUL P. O'BRIEN, CLERK



158A 5073
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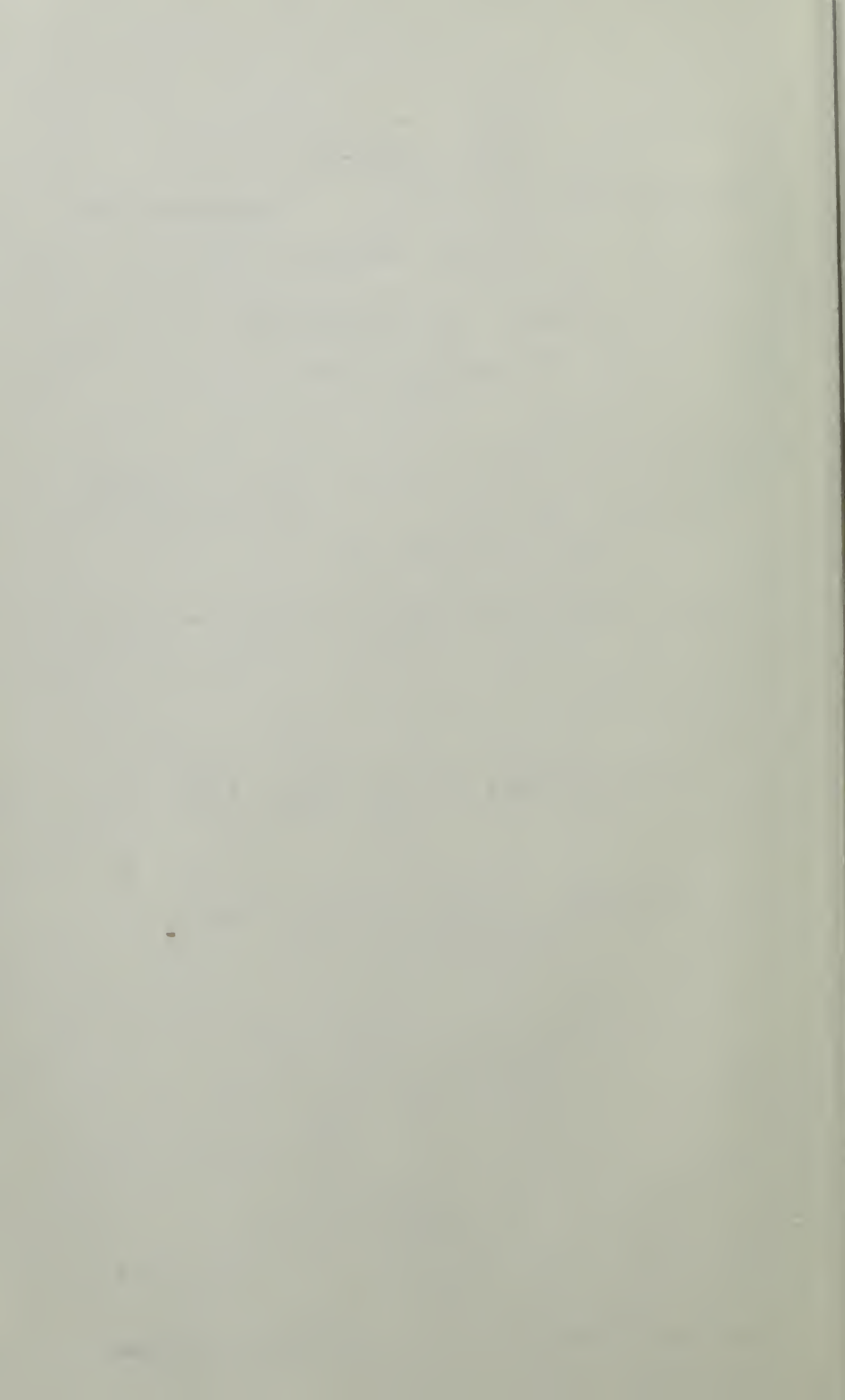
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

YATES, MURPHY & CARLSON,
EDWARD M. MURPHY,

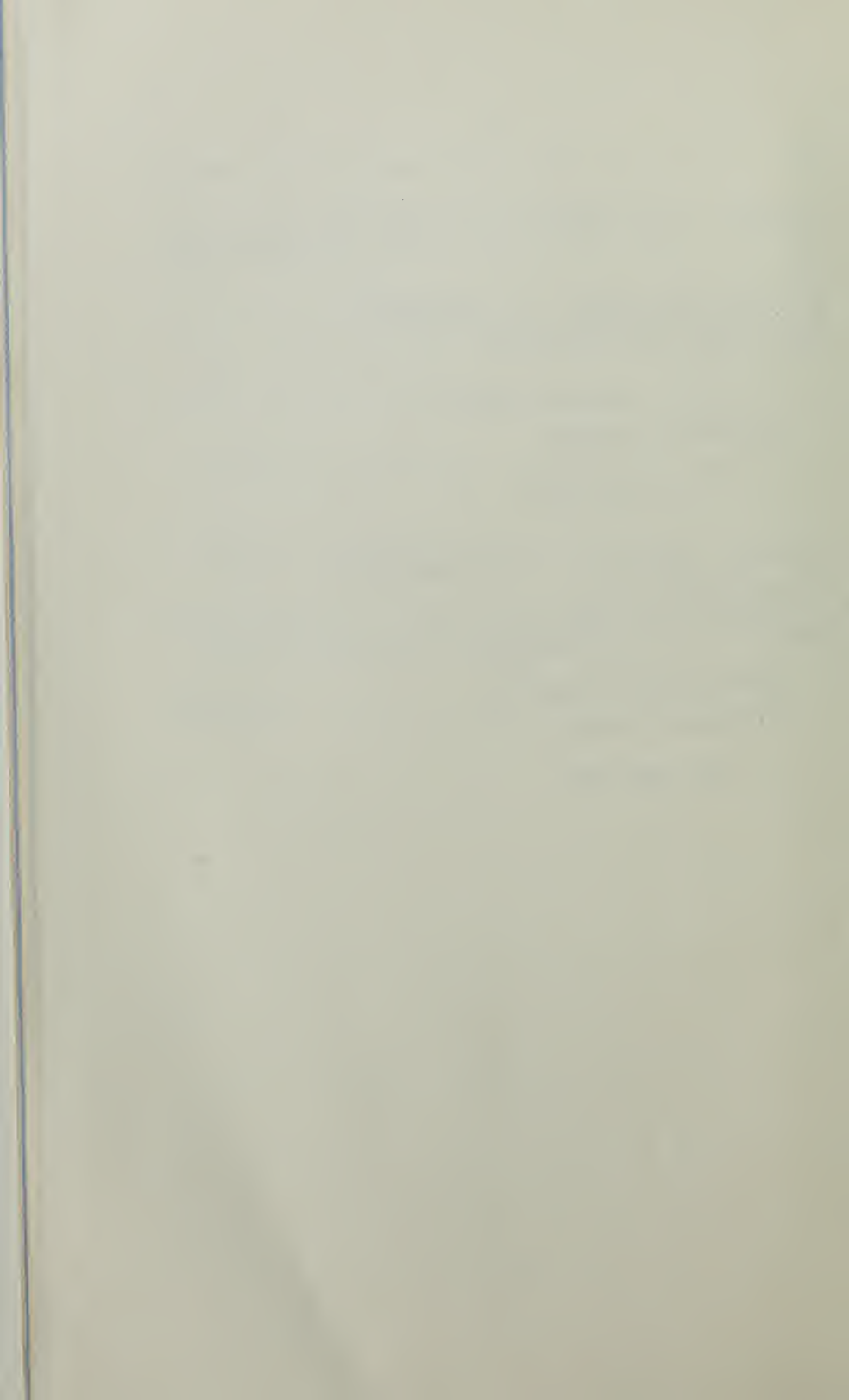
744 S. E. Jackson Street,
Roseburg, Oregon,

For Appellants.

BLACK, KENDALL & TREMAINE,
GEORGE BLACK,
MILTON C. LANKTON,

1200 Cascade Building,
Portland, Oregon,

For Appellee.



In the United States District Court
for the District of Oregon

Civil No. 9409

ROBERT N. CAMERON and JACK CRAW-
FORD, Plaintiffs,
vs.

VANCOUVER PLYWOOD CORPORATION, a
Washington Corporation, Defendant.

PETITION FOR REMOVAL

To: The Judges of the United States District Court
for the District of Oregon:

The petition of Vancouver Plywood Co., a Wash-
ington corporation, respectfully shows:

I.

That an action was commenced against Petitioner, Vancouver Plywood Co., a Washington corporation, in the Circuit Court of the State of Oregon in and for the County of Douglas, entitled: Robert N. Cameron and Jack Crawford, plaintiffs, vs. Vancouver Plywood "Corporation", a Washington corporation, defendant, Docket No. 20459 in said court; that a copy of Summons (Exhibit "A" annexed hereto), and a copy of Complaint (Exhibit "B" annexed hereto), were first served on the petitioner upon the 16th day of September, 1957. That on September 26, 1957, petitioner filed an Answer (Exhibit "C" annexed hereto) in said action. That on September 27, 1957, Yates, Murphy & Carlson,

attorneys for plaintiffs in said action, filed a Motion for Change of Judge, together with Affidavit in support thereof (Exhibit "D" annexed hereto) and Motion to Set for Trial (Exhibit "E" annexed hereto), copies of which were delivered to petitioner on September 28, 1957. No further proceedings have been had therein.

II.

The above described action is a civil action of which this Court has original jurisdiction under the provisions of Title 28, United States Code, Section 1332, and is one which may be removed to this Court by the petitioner, defendant therein, pursuant to the provisions of Title 28, United States Code, Section 1441; in that it is a civil action wherein the amount in controversy exceeds the sum or value of \$3,000.00 exclusive of interest and costs, and is between citizens of different states. The plaintiffs, Robert N. Cameron and Jack Crawford, at the time this action was commenced were and still are citizens, residents, and inhabitants of the State of Oregon; and the defendant, Vancouver Plywood Co., at the time this action was commenced was and still is a corporation incorporated under the laws of the State of Washington and was not and is not incorporated under the laws of the State of Oregon wherein this action was brought.

III.

That twenty days have not elapsed since the receipt by the defendant, Vancouver Plywood Co., of

a copy of the initial pleadings setting forth the claim for relief upon which the said action was based.

IV.

Petitioner files herewith a bond with good and sufficient surety conditioned, as provided by Title 28, United States Code, Section 1446(d), that it will pay all costs and disbursements incurred by reason of the removal proceedings, hereby brought should it be determined that this action is not removable or is improperly removed.

Wherefore, petitioner prays that said bond and surety be accepted and that the above action now pending against him in the Circuit Court of the State of Oregon in and for the County of Douglas, be removed therefrom to the United States District Court for the District of Oregon.

BLACK, KENDALL & TREMAINE,
/s/ GEORGE BLACK JR.,
Attorneys for Petitioner.

Duly Verified.

EXHIBIT "A"

In the Circuit Court of the State of Oregon
for the County of Douglas

ROBERT N. CAMERON and JACK CRAW-
FORD, Plaintiffs,

vs.

VANCOUVER PLYWOOD CORPORATION, a
Washington corporation, Defendant.

SUMMONS

To Vancouver Plywood Corporation, a Washington
corporation, Defendant.

In the Name of the State of Oregon: You are hereby required to appear and answer the complaint filed against you in the above-entitled cause within ten days from the date of service of this summons upon you, if served within this county; or if served within any other county of this state, then within twenty days from the date of the service of this summons upon you; or if served outside the State of Oregon but within the United States, then within four weeks from the date of the service of this summons upon you; or if served outside the United States, then within six weeks from the date of the service of this summons upon you; and if you fail so to answer, for want thereof, the plaintiffs will take judgment against the defendant for the sum of Eighteen Thousand Dollars (\$18,000.00) together with plaintiffs' costs and disbursements herein to be taxed.

YATES, MURPHY & CARLSON,
Attorneys for Plaintiffs.

EXHIBIT "B"

[Title of Circuit Court and Cause.]

COMPLAINT

Come now the plaintiffs and for cause of action against the defendant complain and allege as follows:

I.

That at all times herein mentioned the defendant was a Washington corporation, licensed to do business in the State of Oregon. That at all times herein mentioned the plaintiffs were co-partners.

II.

That on or about the 17th day of July, 1957, in Douglas County, Oregon, the plaintiffs and the defendant entered into an oral contract whereby the parties agreed that the plaintiffs would log the defendant's timber on the following described real property, to wit:

Lots 1, 2, 3, 6 and 7, in Section 17, Township 25 South, Range 3 West, Willamette Meridian, Douglas County, Oregon,

and deliver said logs to the defendant's plywood plant at Springfield, Oregon; that it was further agreed that said logging operation was to be completed by January 1st, 1958; that the defendant in turn agreed to pay the plaintiffs for their services the sum of Twenty-Nine Dollars (\$29.00) per thousand feet net scale for all logs delivered to defendant's mill at Springfield, Oregon.

Exhibit "B"—(Continued)

III.

That thereafter the defendant refused to permit the plaintiffs to log said timber, and continues to refuse to permit the plaintiffs to log said timber. That by virtue of the defendant's breach of the contract described in paragraph II above the plaintiffs have sustained damages in the sum of Eighteen Thousand Dollars (\$18,000.00).

Wherefore, plaintiffs demand judgment against the defendant for the sum of Eighteen Thousand Dollars (\$18,000.00) together with plaintiffs' costs and disbursements herein to be taxed.

Dated September 11, 1957.

YATES, MURPHY & CARLSON,
Attorneys for Plaintiffs.

Duly Verified.

EXHIBIT "C"

[Title of Circuit Court and Cause.]

ANSWER

Comes now defendant Vancouver Plywood Co., a Washington corporation, and for Answer to the allegations in plaintiffs' complaint admits that at all times mentioned therein this defendant was a Washington corporation licensed to do business in the State of Oregon, but denies each and every other allegation contained in the complaint.

Exhibit "C"—(Continued)

Wherefore, having fully answered plaintiffs' complaint, this defendant prays that judgment be rendered and entered in its favor.

BLACK, KENDALL & TREMAINE,
Of Attorneys for Defendant Vancouver Plywood
Co., a Washington corporation.

[Endorsed]: Filed October 3, 1957.

[Title of District Court and Cause.]

BOND ON REMOVAL

Know All Men By These Presents, that we, Vancouver Plywood Co., a Washington Corporation, as Principal, and Great American Indemnity Company, a corporation organized under the laws of the State of New York, as Surety, are jointly and severally held and firmly bound unto the above named plaintiffs, Robert H. Cameron and Jack Crawford, in the sum of One Thousand Dollars (\$1,000.00) for the payment of which sum, well and truly to be made, we jointly and severally bind ourselves, our successors and assigns, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the above named defendant, Vancouver Plywood Co., filed its petition in the United States District Court for the District of Oregon, for removal of the above entitled cause from the Circuit Court of the State of Oregon for the County of Douglas to said United States District Court for the District of Oregon.

Now, Therefore, if the said defendant, Vancouver Plywood Co., the principal herein, shall pay all costs and disbursements incurred by reason of such removal proceedings should it be determined that this case was not removable or was improperly removed, then this obligation shall be void; otherwise it is to remain in full force and effect.

In Witness Whereof, we have executed these presents this 2nd day of October, 1957.

VANCOUVER PLYWOOD CO,

/s/ By C. B. PERRY,
Secretary,
(Principal).

[Seal] GREAT AMERICAN INDEMNITY
COMPANY,

/s/ By (Illegible),
Attorney-in-Fact,
(Surety).

Countersigned:

WELLS-REED INSURANCE,

/s/ By (Illegible),
President,
Resident Agents.

[Endorsed]: Filed October 3, 1957.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and respectfully moves the Court to enter a summary judgment in the defendant's favor dismissing the action for the reasons and upon the grounds that for purposes of this motion there is no genuine issue as to any material fact and that upon plaintiffs' depositions and in view of the relevant facts therein stated, the contract upon which plaintiffs rely herein is contrary to public policy and unenforceable as a matter of law.

This motion is based upon the pleadings and depositions filed in this case.

MILTON C. LANKTON and
BLACK, KENDALL & TREMAINE,
/s/ MILTON C. LANKTON,
Attorneys for Defendant.

Affidavit of Service Attached.

[Endorsed]: Filed January 27, 1958.

In the United States District Court
for the District of Oregon

Civil No. 9409

ROBERT N. CAMERON and JACK CRAW-
FORD, Plaintiffs,

vs.

VANCOUVER PLYWOOD CORPORATION, a
Washington corporation, Defendant.

ORDER AND JUDGMENT

It is hereby

Ordered that the defendant's Motion for Summary Judgment be and the same is hereby granted, and it is further

Ordered that the plaintiffs' action be and the same is hereby dismissed with prejudice.

Dated this 19th day of March, 1958.

/s/ GUS J. SOLOMON,
U. S. District Court Judge.

Presented by:

MILTON C. LANKTON and
BLACK, KENDALL & TREMAINE,
Attorneys for Defendant.

[Endorsed]: Filed March 19, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT
OF APPEALS

Notice Is Hereby Given that Robert N. Cameron and Jack Crawford, co-partners, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order dated March 19, 1958, in the above-entitled action granting the defendant's motion for summary judgment and dismissing the above-entitled action with prejudice.

Dated this 15th day of April, 1958.

/s/ EDWARD M. MURPHY,
Of YATES, MURPHY &
CARLSON,

Attorneys for Appellants, Robert N. Cameron and
Jack Crawford, Co-partners.

[Endorsed]: Filed April 15, 1958.

[Title of District Court and Cause.]

POINT INTENDED TO BE RELIED UPON
ON APPEAL AND DESIGNATION OF
RECORD BY THE APPELLANTS

The Court erred in granting defendant's motion for a summary judgment dismissing the complaint.

The appellants designate the following to be included in the record on appeal:

1. Complaint.
2. Answer.

3. Defendant's petition for removal to the United States District Court.

4. Bond on removal to the United States District Court.

5. Defendant's motion for summary judgment.

6. Order of the United States District Court granting defendant's motion for summary judgment.

7. Appellants' notice of appeal.

The appellants designate, to be included in the record on appeal, those portions of the depositions of the plaintiffs and William C. Smith attached hereto.

Respectfully submitted,

/s/ EDWARD M. MURPHY,
Of YATES, MURPHY, & CARLSON,
Attorneys for Plaintiffs-Appellants.

* * * * *

Affidavit of Mailing Attached.

[Endorsed]: Filed May 19, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Petition for Removal with copy of Complaint and

Answer attached; Bond on Removal; Motion for Summary Judgment; Memorandum Opinion; Order and Judgment; Notice of Appeal; Bond for Costs on Appeal; Designation of Portions of Record on Appeal; and Transcript of Docket Entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9409, in which Robert N. Cameron and Jack Crawford, are plaintiffs and appellants, and Vancouver Plywood Corporation, a Washington corporation, is defendant and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellants, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 20th day of May, 1958.

[Seal] R. DeMOTT,
 Clerk,
 /s/ By MILDRED SPARGO,
 Deputy.

[Title of District Court and Cause.]

COUNTER DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To: Robert H. Cameron and Jack Crawford,
 plaintiffs, and Yates, Murphy and Carlson and
 Edward M. Murphy, attorneys for plaintiffs.

You and each of you, will take notice that de-

fendant designates for inclusion in the record on appeal of the above entitled case to the United States Court of Appeals for the Ninth Circuit, the following portions of the record, proceedings and evidence in such case in the District Court:

1. Those portions of the deposition of plaintiff Jack Crawford which appear on pages 29 through 59 of the deposition and which have been omitted from appellants' designation of contents of the record on appeal.

2. Those portions of the deposition of plaintiff Robert N. Cameron which appear on pages 91 through 106 of the deposition and which have been omitted from appellants' designation of contents of the record on appeal.

3. Those portions of the deposition of William C. Smith which appear on pages 3 through 30 of the deposition and which have been omitted from appellants' designation of contents of the record on appeal.

4. This counter-designation of contents of the record on appeal.

MILTON C. LANKTON and
BLACK, KENDALL & TREMAINE,
/s/ MILTON C. LANKTON,
Attorneys for Defendant-Appellee.

Affidavit of Service Attached.

[Endorsed]: Filed May 29, 1958.

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Order extending time to docket appeal; and Counter designation of contents of record on appeal constitute the supplemental record on appeal in the case of Robert N. Cameron and Jack Crawford, plaintiffs and appellants vs. Vancouver Plywood Corporation, a Washington corporation, defendant and appellee; Civil No. 9409; that the said record has been prepared by me in accordance with the counter designation of contents of record on appeal filed by the appellee, and in accordance with the rules of this court.

I further certify that there is enclosed herewith the deposition of William C. Smith and the depositions of Robert N. Cameron and Jack Crawford.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 29th day of May, 1958.

[Seal] R. DeMOTT,
Clerk,

/s/ By THORA LUND,
Deputy.

[Title of District Court and Cause.]

DEPOSITIONS OF ROBERT N. CAMERON AND JACK CRAWFORD

Be It Remembered, That, pursuant to the stipulation of counsel for the respective parties herein-after set forth, the depositions of Robert N. Cameron and Jack Crawford, the plaintiffs above named, were taken as discovery depositions in behalf of defendant before Mary Wakefield, a Notary Public for Oregon and an Official Reporter of the Circuit Court of the State of Oregon for the County of Multnomah, on Friday, December 20, 1957, beginning at the hour of 1:30 p.m., at the law offices of Messrs. Black, Kendall & Tremaine, 1200 Cascade Building, Portland, Oregon. [1]*

* * * * *

JACK CRAWFORD

one of the plaintiffs herein, was produced as an adverse witness in behalf of defendant, and, having been first duly sworn by the Notary, was examined and testified as follows:

Direct Examination

Q. (By Mr. Higgins): Would you state your full name, please? A. Jack Crawford. [3]

* * * * *

Q. What is your age? A. Thirty-three.

Q. What is your occupation? A. Logger.

* * * * * [4]

* Page numbers appearing at top of page of Original Deposition.

(Deposition of Jack Crawford.)

Q. So far as major equipment goes, since 1953 you have owned, in connection with your logging operations, a portable loader, a cat and a pickup, is that correct? A. Yes. [8]

* * * * *

Q. You and Mr. Cameron met at the tract of timber?

A. Yes. We were cruising the timber.

Q. Did you go there together? A. Yes.

Q. And you believe that that was about the 1st of July, 1957? A. Yes.

Q. Do you know that that was the exact date?

A. No, I don't know that that is the exact date. That is approximately the right date. [10]

* * * * *

Q. Was your first contact with Vancouver Plywood Company before or after the meeting you have mentioned between yourself and Mr. Cameron out at the site? A. Yes, it was after.

Q. After? A. Yes.

Q. Do you know what the status of the timber was at the time that you and Mr. Cameron were first out there? Was it up for sale?

A. Yes, it was up for sale by the Bureau of Land Management at Roseburg. [11]

* * * * *

Q. As I understand your testimony, Mr. Crawford, and I want you to correct me if I am wrong, it came to your knowledge that timber on the property which is described in your complaint had come up for sale, and I understand that to

(Deposition of Jack Crawford.)

mean had been offered for sale by the Bureau of Land Management, and hadn't been purchased by anyone? A. That is right.

Q. And that approximately ten days after that unsuccessful sale, you and Mr. Cameron went to the site, that is, to the area described in your complaint? A. Yes.

Q. What did you actually do there at the site?

A. Well, we cruised the timber and we come up with a small fall down in the cruise from what the O. & C. offered that [12] cruise for. [13]

* * * * *

Q. My understanding of your testimony, Mr. Crawford, is that before this day that we have been talking about on which you and Mr. Cameron went out to the area together, you had had no contact with Vancouver Plywood Company nor any of its representatives concerning this particular area or the timber standing on it, is that correct? Is my understanding correct?

A. At the time that Mr. Cameron and I were cruising the timber, we hadn't contacted anyone.

Q. Had either one of you, to your knowledge?

A. No.

Q. Had you been contacted by Vancouver Plywood Company or any of its representatives in connection with this property or the timber standing on it before you and Mr. Cameron first went out there?

A. Well, I had talked to Mr. Smith on different occasions about timber sales and he told me anytime

(Deposition of Jack Crawford.)

that I found a piece of timber that I was interested in, they would look at it and let me know whether they were interested. [19]

* * * * *

Q. When was it that you first had any contact with Vancouver Plywood Company or any person connected with Vancouver Plywood Company regarding the particular tract described in your complaint?

A. I don't remember the correct date.

Q. I don't mean the exact date. When was it with reference to the day that you and Mr. Cameron went out to the site?

A. I think it was the next day.

Q. Just tell me what that contact consisted of.

A. Well, I give Mr. Smith the prospectus of the sale and he looked it over and said that he was interested and that he would take his cruiser and go down and look it over.

Q. By "Mr. Smith" you mean Bill Smith?

A. Yes.

Q. When you say you gave him the prospectus, is that some type of form or document that the government prepares?

A. Yes, for a tract of timber when they put it up for sale.

Q. In other words, you gave to him only a government form which [21] had been given to you?

A. Yes.

Q. Did you tell him anything more about the timber?

(Deposition of Jack Crawford.)

A. We just talked about the price of logs that they were selling, their price on logs and what they were paying, and he quoted them and he said that he would either let us sell the logs back to them or he would let us log for them for so much a thousand. [22]

* * * * *

Q. Can you just give me here and now your best recollection of everything that was said in that conversation, either by you or Mr. Smith?

A. Well, it wasn't a long conversation. We have already talked about just about all that took place. Should I go over that?

Q. Just tell me, if you will, everything that you can recall that was said by you or by Mr. Smith at this particular time.

A. Well, I asked Mr. Smith if he was interested in this tract of timber at Sutherlin, and he said that he would take his cruiser down and go himself and look at it, and if he was interested, why, he would let me know. [23]

* * * * *

Q. What was the next contact that you had with Vancouver Plywood Company or anyone connected with Vancouver Plywood Company regarding this particular tract?

A. I think the next contact was a phone call from Mr. Smith. He asked me how much that I would log the tract of timber for and I told him over the phone \$29 a thousand, and that included building the road.

(Deposition of Jack Crawford.)

Q. Was anything else said in that telephone conversation? A. No. [25]

* * * * *

Q. He didn't say anything further to you?

A. I can't remember anything of any importance. I mean Bill Smith, we have known each other for years—probably small talk took place.

Q. But you can't recall anything else which was said regarding this particular tract with timber on it or any proposed logging operation in that telephone conversation, either by you or by Bill Smith?

A. No. I think he did tell me, too, that they had went down and cruised the timber and that they had come up with a shortage than what the O. & C. cruise was.

Q. Did he say anything to you about how much of a shortage their cruise showed?

A. I think he said 18 per cent.

Q. What was the next contact which you had with the Vancouver Plywood Company, or anyone connected with that company, regarding this particular tract? A. State that question again.

* * * * * [26]

Q. Just going back a little bit, you talked to Bill Smith regarding this tract— A. Yes.

Q. —the first time at their log pond, at Vancouver Plywood log pond, the day after you and Mr. Cameron were out at the site?

A. That is right.

Q. Then sometime after that he telephoned you? A. Yes.

(Deposition of Jack Crawford.)

Q. Can you recall how long it was after you first talked to him out there at the log pond that he telephoned you?

A. It was approximately three days, or four.

Q. How long was it from that telephone call to the next time you had any contact with Bill Smith or Vancouver Plywood Company?

A. I think it was the next day or the day after.

* * * * * [27]

Q. Will you tell me to the best of your recollection everything that was said in that conversation?

A. We talked about the sale and the type of timber.

Q. For example, what did you say about the sale and what did he say about the sale?

A. Well, he said that was just the type of log they wanted right at that time, that they would like to have it all in their pond right then if they could get it.

Q. And what else, if anything, was said?

A. And he said that he would like to have around 75,000 feet a day delivered to their pond.

Q. Was there anything else said, either by him or by you, about the logging of that area?

A. Well, we talked about the road, that it had to be built in the area, and that we could log out both units without building the road, and then build the road after the timber was taken off because it wasn't necessary to build the road first.

Q. Was there anything said about the price of the logging?

(Deposition of Jack Crawford.)

A. Well, we had already agreed upon \$29 in that telephone conversation.

Q. Was that figure or any other figure mentioned in this conversation in Bill Smith's office?

A. I don't remember.

Q. Have you told me everything you can recall about that conversation in Bill Smith's office?

A. Yes.

Q. At that time, the time of your conversation with Mr. Smith in his office, were you shown any writing concerning the cruise for Vancouver Plywood Company made of the area? A. No.

Q. After that meeting between yourself and Mr. Smith in Mr. Smith's office, what was the next contact, if any, which you had with Vancouver Plywood Company regarding this tract or the timber or any logging on the tract?

A. I think the next meeting Mr. Smith and I had was the afternoon before the sale date, which was July the 17th.

Q. When you say "which was July the 17th," what do you mean was July 17th?

A. Which was the sale date.

Q. The 17th was the sale date? A. Yes.

Q. And where did you have any contact with Mr. Smith on July 16th? [29]

A. That was at the Springfield plant.

Q. And where at the plant?

A. In his office.

Q. And who was present?

A. Mr. Smith and myself.

(Deposition of Jack Crawford.)

Q. No one else? A. No.

Q. Just tell me, if you will, what occurred at that time.

A. Well, he told me that he had already went down and put his check down for the sale, and I told him that in the event they decided not to buy the sale, that Bob and I had decided that we were going to buy it and that we were going to enter a bid, too, so the next day I went down and put my check down for the sale, too.

Q. How did you happen to go to the Vancouver Plywood Company mill on the 16th? Why did you go there?

A. To tell him this, that I was going to enter a bid, too.

Q. Do you remember what time of day it was approximately that you were talking to Mr. Smith on the 16th?

A. It was probably around three or four.

Q. In the afternoon?

A. Yes, between three and four o'clock.

Q. Was the plant in operation when you arrived there? A. I don't think so.

Q. Was it in operation when you left? [30]

A. I don't remember.

Q. Are you acquainted with any of the personnel of the Vancouver Plywood Springfield plant other than Bill Smith? A. Just Bill Smith.

Q. No one else? A. No one else.

Q. How long did you remain at the plant on the afternoon of the 16th?

(Deposition of Jack Crawford.)

A. I probably wasn't there over ten minutes.

Q. Did you go there alone? A. Yes.

Q. Where did you go after you left there?

A. I went home.

Q. As I understand it, when you arrived in Mr. Smith's office, he told you that on behalf of the Vancouver Plywood Company he had entered a bid and deposited a check on the timber. Is that right? A. That is right.

Q. Between the time that you and Mr. Cameron first went out to the site—I think you said it was about July 1st—and this date of July 16th, had you been working on any logging operation at all? A. No.

Q. To your knowledge had Mr. Cameron been working on any logging operation during that time? [31] A. Yes.

Q. He had? A. Yes.

Q. Where was that, do you know?

A. At Roseburg.

Q. And to your knowledge was Mr. Cameron employed by someone else in that Roseburg operation or was he operating for himself?

A. For himself, I think.

Q. Had you and Mr. Cameron met sometime between the first of July and the 16th of July and determined that you would enter a bid on this property? A. Yes.

Q. Do you remember when that was?

A. It was one Sunday afternoon. My wife and

(Deposition of Jack Crawford.)

I and family went down to Bob's home and we talked it over one Sunday afternoon.

Q. How long was it before the 16th of July?

A. Well, it was the weekend before the sale date.

Q. The weekend before the 16th?

A. Yes.

Q. In connection with any bid which was to be made for this timber, was there a minimum dollar requirement set by the government, that is, did any bid have to exceed so many dollars?

A. State your question again.

Q. At the time that you and Mr. Cameron were discussing this matter in connection with making a bid on the timber, did the [32] government, to your knowledge, have any requirement for a minimum bid?

A. They had an appraised price and it had to sell at that price or it wouldn't be sold.

Q. In other words, any bid had to equal at least the appraised price? A. Yes.

Q. Do you remember what that appraised price was?

A. I don't remember without looking at the sale again.

Q. Do you remember approximately what it was? A. I wouldn't want to say.

Q. Would you remember whether it was approximately \$98,000? A. Yes.

Q. You think it was approximately \$98,000?

A. Yes.

(Deposition of Jack Crawford.)

Q. Mr. Crawford, with regard to a bid on the timber on this property, was the bid required to be on a cash basis? That is, in the event your bid was accepted, would you have to pay the approximate \$98,000 in cash prior to starting operations?

A. In order to bid we had to put up \$5,600, a \$5,600 check in order to be eligible to bid.

Q. And then in the event that you bid were accepted, were you required to pay the full cash price immediately for the timber? A. No.

Q. Can you tell me what the terms of purchase would be in the [33] event such a bid were accepted?

A. The payments were divided up in several payments. I don't remember the exact figures of each payment.

Q. Do you recall that the bidding requirements called for the equivalent of a down payment of \$20,000 prior to the commencement of cutting?

A. I think so.

Q. I take it that at the time that you and Mr. Cameron decided to submit a bid, you had between you at last \$5,700, is that correct? A. Yes.

Q. Did you have between you additional money?

A. Yes.

Q. Did you have between you in addition to the \$5,700, \$14,000? A. No, sir.

Q. Can you tell me at the time you determined to submit a bid how much you had between you which you could devote to the purchase price of this contract?

(Deposition of Jack Crawford.)

A. Our plans were—the money that we put down as the down payment was all that we were putting up at that time, but we had another interested party that would put up the money if we didn't deal with Vancouver Plywood.

Q. Did you have a firm commitment from someone to provide the approximate \$14,000 balance of the down payment required on this contract? [34]

A. No.

Q. Did you have any type of commitment from anyone to provide you with money for the down payment on the contract at the time that you determined to submit your bid?

A. This other party said that they would help us out on meeting the stumpage payments.

Q. And who was that?

A. U. S. Plywood in Eugene.

Q. With whom connected with U. S. Plywood did you discuss this matter?

A. Bill Phillips.

Q. And when was that?

A. I don't remember the exact date. It was sometime before the 17th.

Q. Where was it that you discussed this matter with Mr. Phillips? A. U. S. Plywood, Eugene.

Q. Did the discussion of this matter take place on only one occasion? A. Yes.

Q. Who was the discussion between?

A. Bill Phillips and myself.

Q. Mr. Cameron wasn't present? A. No.

(Deposition of Jack Crawford.)

Q. Just tell me, if you will, what was said in that discussion.

A. Well, I told him that we were working with Vancouver Plywood [35] on this, and in the event that it didn't work out, that I would like to deal with U. S. Plywood.

Q. Did Mr. Phillips say anything to you about supplying monies to you for the down payment or otherwise?

A. Yes. That was understood, that we would have to have help.

Q. No, I don't mean understood. Did he actually say anything to you about paying any money to you or on your account for this contract?

A. Well, we talked that if things didn't work out with Vancouver Plywood, they would help us out on the money to pay for the stumpage. There wasn't any definite amount talked about.

Q. I take it that before you met with Bill Smith, which you have testified to on the 16th of July, 1957, you didn't know that Vancouver Plywood had made a bid on the timber?

A. Did you say—what was the date that you stated?

Q. The 16th when you went to his office.

A. To Mr. Phillips' office?

Q. No, Bill Smith's.

A. He told me that he was going to put a check down on the tract of timber.

Q. I said before you went to his office that

(Deposition of Jack Crawford.)

afternoon of July 16, 1957, you didn't know that he had made a bid?

A. Oh, yes, I knew he had. He had already put down his check. Then I had—after talking to Mr. Cameron, we decided that we would put down a bid, too, to insure ourselves of the tract of [36] timber in the event that they didn't go ahead and buy.

Q. In other words, before you went to Bill Smith's office on July 16th, you knew that Vancouver Plywood Company had entered a bid on the timber?

A. Yes, I knew.

Q. How did you know it?

A. Bill told me.

Q. When did he tell you?

A. Well, it was a few days prior to the sale date.

Q. As I understand it, you had had only three contacts with Bill Smith before the afternoon of the 16th of July regarding this particular tract of timber, and those were the first contact at the millpond and before Vancouver Plywood had had a cruise of the area?

A. Yes.

Q. The second was a telephone conversation three or four days after the first contact, and the third in Bill Smith's office the day after that telephone conversation?

A. Yes.

Q. Had he told you on one of those occasions that Vancouver Plywood had actually submitted a bid?

A. Yes.

Q. And on which of those occasions?

(Deposition of Jack Crawford.)

A. I think in the telephone conversation we had, that he would go down and submit a bid. [37]

Q. When you say that he told you that he would go down and submit a bid, he was saying that he had not yet done it, is that correct? A. Yes.

Q. And then you met with him the following day in his office, is that right?

A. I think that is—

Q. Let me ask you this: Before the afternoon of the 16th of July, 1957, had Bill Smith ever told you that Vancouver Plywood Company had submitted a bid on this tract?

A. Before the telephone conversation?

Q. No, before the discussion that you talked about being the day before the sale date.

A. He had told me before that day.

Q. Had he told you that Vancouver Plywood had already submitted a bid? A. Yes.

Q. And when was it that he told you that they had already submitted a bid?

A. I don't remember the date. It was some time before that date.

Q. Well, was it some contact other than the ones we have talked about here?

A. It could have been, but I don't remember just when that would have been.

Q. As I understand it, we have named off all of the contacts [38] which you had with Mr. Smith in which there was any reference to this tract of timber or the logging of it, and those contacts were these: The contact when you met him at the

(Deposition of Jack Crawford.)

millpond, the day after when you and Mr. Cameron were up there, a telephone call when he contacted you at your home three or four days after that, when you went to his office when you talked with him, and that was on the 16th of July. Did you have any other contact with him regarding this site or logging of it?

A. I can't remember any other dates, but it seems like there was.

Q. Can you remember any other contact?

A. No.

Q. Did you find out from any source other than Bill Smith that Vancouver Plywood had submitted a bid on this timber?

A. I think Bill Smith told me sometime during that——

Q. Were you told by anyone other than Bill Smith? A. No.

Q. Now, after the discussion which you say you had with Bill Smith on the afternoon of the 16th of July, when did you next have any contact with Vancouver Plywood Company, or anyone connected with Vancouver Plywood Company, with regard to this timber? A. That is after the 16th?

Q. Yes.

A. Well, I met Bill Smith the next day in front of the Coast [39] Cable Company, a supply company in Glenwood, and we went down to the sale together.

Q. Where was the sale held?

(Deposition of Jack Crawford.)

A. At Roseburg, the Bureau of Land Management's office.

Q. And you say you met Bill Smith where?

A. In front of Coast Cable Logging Supply in Glenwood.

Q. Where is that?

A. It is between Springfield and Eugene.

Q. You went from there to the sale together?

A. Yes.

Q. How far a distance is that?

A. Approximately seventy-five miles.

Q. How did you go together?

A. In Bill's car.

Q. Did you meet there in Lynwood by some prior arrangement or did you just happen to run into one another?

A. We had talked to each other the day before and he had told me to meet him there and then we would go down together.

Q. As I understand it, on the day before you only talked to Bill Smith on one occasion, and that is the occasion in his office that you previously mentioned? A. Yes.

Q. You didn't talk to him after that on the 16th or before that on the 16th?

A. Well, I talked to him before the 16th. [40]

Q. No, no, on the 16th. You just talked to him the one time on the 16th? A. Yes.

Q. I understand you now to say that in that conversation on the 16th you made some arrangement to meet the following day? A. Yes.

(Deposition of Jack Crawford.)

Q. Tell me what was said about that, if you will, on the 16th.

A. I think I was to meet Bill in front of this supply company about seven-thirty the morning of the 17th and we would go down to the sale together.

Q. You have stated that you told Bill Smith that you and Mr. Cameron were going to enter a bid.

A. Yes.

Q. Or had you already entered a bid, was that it?

A. No, I told him that we were going to enter a bid.

Q. I see, and what did he say about that?

A. He said to go ahead, that it wouldn't—

Q. Did you then enter a bid? A. Yes.

Q. When?

A. On the morning of the 17th.

Q. All right, now, on the morning of the 17th you met in Lynwood? A. Glenwood.

Q. Is it Glenwood? A. Yes. [41]

Q. I see. You met in Glenwood and drove from there to the sale in Bill's car? A. Yes.

Q. Who was present during that time?

A. During the sale?

Q. No, from the time you met until you arrived at the place of the sale.

A. Just Bill Smith and myself.

Q. And on the way from Glenwood to the sale, did you discuss this matter at all? A. Yes.

(Deposition of Jack Crawford.)

Q. Just tell me what that discussion consisted of.

A. Well, I agreed that if Bob and I got the job of logging it, we would withdraw our bid.

Q. Well, just tell me who said what and what was said, if you will.

A. Well, I can't remember of too much being said other than that.

Q. You say you agreed that if you and Mr. Cameron got the logging job, you would withdraw your bid on the timber, is that correct?

A. Yes.

Q. And what did Mr. Smith say to that?

A. He said that would be all right.

Q. Do you say that he agreed that you would get the job? A. Yes. [42]

Q. Then what, if anything else, was said?

A. That is a hard thing to answer. We talked about several things but it was small talk.

Q. Well, did you say anything more about this timber or the bidding on it or anything in connection with it? A. No.

Q. Just what you have told me here now?

A. Yes.

Q. And just to be sure that we have it correctly and have all of it, you told Mr. Smith that if you and Mr. Cameron got the logging job, that you would withdraw your bid, and you say that he said that was agreeable, that you could have the job, is that correct?

A. Yes. I think there is one thing there I

(Deposition of Jack Crawford.)

ought to correct. I think I said I submitted that bid on the 17th. It was a day or two before the 17th when that bid was put in.

Q. Was it before the 16th?

A. I think that it was the 16th because I am pretty sure I had stopped by Bill Smith's office on the 16th and told him that I had submitted a bid.

Q. It is your recollection now that at the time you stopped at Mr. Smith's office on the 16th you had already submitted a bid? A. Yes.

Q. And you told him why you submitted a bid?

A. Yes. [43]

Q. Do you remember what the bid was that you submitted, what the amount was?

A. Just the appraised price.

Q. What reason did you give him for having submitted the bid?

A. Well, it made us eligible to bid in case they didn't want to buy the timber, or if anybody else had put in a bid and were there raising the bid higher than Vancouver would want to pay for it.

Q. At the time that you submitted your bid, did you know what the Vancouver Plywood bid was?

A. I didn't know but I figured it was the appraised price.

Q. You didn't have any information as to the amount of Vancouver Plywood Company's bid at the time that you submitted the bid? A. No.

Q. Is that correct?

A. Well, Mr. Smith, he had told me before, I think, that he wasn't going to raise it but very little

(Deposition of Jack Crawford.)

over the appraised price in the event anybody else was there bidding.

Q. No, I am talking now about the time that you actually submitted a bid on this, accompanied by checks in the amount of fifty-five or fifty-seven hundred dollars, did you know at that time the amount of the Vancouver Plywood Company's bid?

A. No.

Q. Tell me, if you will, what occurred when you arrived at the sale.

A. The sale was at nine o'clock and our names were placed upon [44] the board and they asked for bids and Mr. Smith, he raised the bid a nickel, and the next bid, I withdrew my bid and the sale was awarded to Vancouver Plywood.

Q. Was Mr. Cameron there at the bidding at all?

A. No. He was there but he was on the outside of the building.

Q. Did he partake in the bidding at all to your knowledge? A. No.

Q. Did you have any conversation with Mr. Cameron between the time that you first arrived at the place of sale and before you withdrew your bid? A. That is on the day of the 17th?

Q. Yes. A. No.

Q. In other words, you went directly into the sale without speaking to Mr. Cameron at all?

A. Yes.

Q. Is it a fair statement, then, Mr. Crawford, that you and Mr. Cameron had previously agreed

(Deposition of Jack Crawford.)

that if you secured the logging contract from Vancouver Plywood, you would withdraw your bid?

A. That is right.

Q. And you didn't have to take that up again with Mr. Cameron at all before withdrawing your bid, is that correct?

A. No.

Q. It is not correct or it is?

A. Mr. Cameron and I had agreed beforehand on what we would do. [45]

Q. So you didn't have to and you didn't then take it up with Mr. Cameron before you went into the bidding?

A. No. After the sale was awarded to Vancouver, I went outside the building and Bob Cameron was there and we waited till Mr. Smith come out. Then Bob and myself and Mr. Smith talked over the timber deal and what would take place afterwards, what their plans were.

Q. Just tell me what that conversation consisted of, what was said.

A. Mr. Smith, he said that he wanted approximately thirty days before we went in there and started logging the timber, and that was agreeable to Bob and I that we would wait until then.

Q. I want you to tell me, if you can, everything you can recall that was said in that conversation.

A. Well, we said that that would be all right to wait thirty days if we had the logging job, and Bill, he said, "Absolutely, you got the logging job when we get ready to log it," and he wanted to wait approximately thirty days before we started.

(Deposition of Jack Crawford.)

Q. Was that everything you can recall that was said? A. Yes.

Q. Who was present during this conversation?

A. Mr. Smith, Bob Cameron and myself.

Q. And where did the conversation take place?

A. In front of the O. & C. office in Roseburg.

Q. Just to go back a minute, Mr. Crawford, at the time you [46] actually submitted a bid on this, did you personally go to the government office to submit the bid? A. Yes.

Q. Did anyone go with you?

A. Bob Cameron.

Q. The two of you went together?

A. Yes.

Q. Did you make a deposit with the bid?

A. Yes.

Q. What did that deposit consist of?

A. It was \$5,700; I think fifty-six or fifty-seven hundred dollars. I don't remember the exact.

Q. Was it a check or two checks?

A. It was two checks.

Q. Whose checks?

A. One of mine and one of Bob's.

Q. Were they in equal amounts? A. Yes.

Q. At the time that you submitted that bid, did you know that Vancouver Plywood Company had also made a bid? A. Yes.

Q. Were you told of that at the government office when you submitted your bid?

A. They told us after we had submitted our bid.

Q. You weren't told before? [47]

(Deposition of Jack Crawford.)

A. Not by that office.

Q. Bill Smith had told you before?

A. Yes.

Q. Is it a fair statement of your testimony that the reason you made that bid was so that you would get the sale if Vancouver Plywood did not?

A. Yes.

Q. But your bid was actually in the lowest amount which could be accepted, isn't that correct?

A. That is right.

Q. And Vancouver Plywood's bid was at least equal to yours, was it not? A. Yes.

Q. You knew that? A. Yes.

Q. Were you familiar with the O. & C. office in Roseburg generally at the time that you went there to submit this bid? A. Yes.

Q. You had been there a number of times before? A. Yes.

Q. Did you know at that time that information as to who has bid on particular tracts is posted in the office? A. No.

Q. Have you told me everything that happened on the 17th of July, 1957 with regard to this tract of property that we have been [48] talking about and the timber standing on it and any proposed logging operation? Is there anything else that happened on the 17th of July, 1957 regarding those matters that you haven't told me about?

A. Nothing that I can remember. After we left, Mr. Cameron, Mr. Smith and I came back to Springfield together.

(Deposition of Jack Crawford.)

Q. You and Mr. Smith rode back together?

A. Yes.

Q. During that ride did you have any discussion concerning this tract or the timber or any proposed logging operation?

A. Not until we reached Springfield and I started to leave. He said that he would notify me when they got ready for us to start logging it.

Q. And did you say anything?

A. I said that would be O.K.

Q. And other than that bit of conversation that you just referred to, was there any other conversation concerning this timber or logging?

A. No.

Q. Now, after the 17th of July, 1957 did you have any further contact with Vancouver Plywood Company at all? A. Yes.

Q. What did that consist of?

A. Something like a week or ten days afterwards, after the sale, we found out there was another logger in there logging it, so [49] Bob Cameron, he called Mr. Smith and talked to him. Then he called and told me what was going on.

Q. When did you find that there was another logger in there logging?

A. Mr. Cameron found that out.

Q. After Mr. Cameron telephoned you, what, if anything, did you do?

A. I didn't do anything. I just—we let it ride for two or three days. Then I called Bob at Roseburg and told him that I thought we should come

(Deposition of Jack Crawford.)

up to Vancouver Plywood and tell them about it, tell their head log buyer, or whoever is in charge, about what happened, and that is what we did.

Q. You came up to the Vancouver plant in Vancouver, Washington? A. Yes.

Q. And do you know who you saw then?

A. It was Mr.—do you remember his name?

Q. It wasn't Mr. Smith? It was someone else?

A. No. It is the man that is in charge of all the log buying for that plant.

Q. And just tell me what happened when you met with that gentleman.

A. Well, we talked the whole situation over and he said that we should have some conversation there and for us to go back and talk to Mr. Smith and ask him what he was going to do about it.

Q. What was it that you actually told this gentleman? What did [50] you say to him?

A. We told him we had made a contract with him to log that piece of timber for \$29 and that he had let some other contract logger in there, who logged it.

Q. And that was all that you told him about it?

A. Oh, there was other details I don't remember right now.

Q. And what did you do after you talked to that gentleman?

A. We went back to Eugene and went to Bill Smith's home and asked him what he was going to do about it.

Q. What, if anything, did he say?

(Deposition of Jack Crawford.)

A. He said, "It is just one of those deals," that they had their logger that was working on some high grade logs and they didn't want those high grade logs right at that time and they thought they would rather put Mr. Nygard in there logging it instead of us.

Q. Up to that time when you talked to Bill Smith, had you ever talked to Mr. Nygard about the matter at all? A. No, I had not.

Q. What did you do after you talked to Mr. Smith?

A. Bob Cameron and I left and we went to Springfield and he got in his car and went home, and so did I.

Q. What was the next thing you did with regard to this property or the timber or any logging operation on that property?

A. Mr. Cameron, he called me and asked me what we should do about it or should we go see a lawyer about it. I told him if [51] he wanted to, to go ahead.

Q. Did you have any further contact with Vancouver Plywood Company about the matter?

A. After the——

Q. After talking to Bill Smith at his home.

A. None.

Q. During any of this time that we have been talking about from July 1, 1957 through the last time that you talked to Bill Smith, which you are just referring to, did you ever receive any letters or correspondence from Vancouver Plywood Com-

(Deposition of Jack Crawford.)

pany regarding this matter? A. No.

Q. None at all? A. None at all.

Q. Any written material at all, notes or anything else? A. No.

Q. During this period of time between July 1st and the time that you last talked with Bill Smith at his home, were you engaged in any discussions with Bill Smith or anyone else connected with Vancouver Plywood Company regarding a Cho-Ho timber sale?

A. Yes. After the sale was made in Roseburg and Mr. Smith wanted to wait a while, I told him that I had another piece of timber at Oakridge and I wanted to know if they would be interested in buying logs, that I was planning on buying this piece of timber. [52]

Q. At that time you were considering buying some timber at Oakridge that was referred to as the Cho-Ho property? A. Yes.

Q. Did you buy that property? A. I did.

Q. Did you know when you bought it?

A. It was July the 22nd.

Q. Was that a government sale?

A. Yes, U. S. Forest Service.

Q. Did Mr. Smith say anything to you with regard to Vancouver Plywood Company's intentions concerning the Cho-Ho sale?

A. He said that he would like to buy the logs.

Q. At that time had you made any cruise of that property?

(Deposition of Jack Crawford.)

A. We did not make a cruise. Vancouver Plywood's engineer and I went up and drove through the timber in his car.

Q. Was that after the sale date on this other site that we have been talking about?

A. Yes.

Q. How long after?

A. Just a minute, that was before the sale date of this tract in Sutherlin.

Q. When did you first talk about this Cho-Ho property with Mr. Smith?

A. I think it was the third conversation that we had.

Q. But in any event, you bought that Cho-Ho property shortly [53] after the sale day on the Sutherlin property, is that right?

A. Yes. I bought it July the 22nd.

Q. How large a stand was that Cho-Ho stand?

A. It sold for 530,000. I took out approximately 1,200,000. That sale is now completed.

Q. Pardon?

A. I say the Cho-Ho sale is now completed.

Q. Did you personally log the Cho-Ho sale?

A. Yes.

Q. When did you commence to log that?

A. It was approximately ten days to two weeks after I received the sale.

Q. In connection with that Cho-Ho sale, is it your recollection that the Vancouver Plywood engineer was up on the Cho-Ho property with you before you bought the property?

A. Yes.

(Deposition of Jack Crawford.)

Q. And you say that the appraised price of the Cho-Ho property was based on 530,000 board feet?

A. Yes.

Q. So from about the end of July, 1957 on for some period of time, you were engaged in logging the Cho-Ho property? A. That is right.

Q. And you took out of there, I think you said, better than a million board feet?

A. Yes. [54]

Q. How long a period of time were you engaged in that logging operation?

A. Approximately four months.

Q. When was it that you first looked at the Cho-Ho property with regard to possible purchase of it?

A. Around the first of July. It was right after the prospectus had been mailed out.

Q. Did you submit a bid on the Cho-Ho property? A. Yes.

Q. Do you know when it was that you submitted that bid? A. July the 22nd.

Q. You hadn't bid before that date?

A. On U. S. Government forest sales you do not submit bids until the auction is to take place.

Q. At the time that you submitted your bid, was there any time requirement as to when logging had to be commenced on that Cho-Ho property?

A. Yes.

Q. What date did logging have to be commenced on that Cho-Ho property?

(Deposition of Jack Crawford.)

A. Well, it had to be out by December the 15th, 1957.

Q. Under what arrangement were you logging that? Were you logging it for someone else or for yourself?

A. I was logging it for myself.

Q. For later sale at a mill, is that correct? [55]

A. Yes.

Q. Did you have commitments from any mills for purchase of the Cho-Ho logs at the time that you purchased the timber? A. No.

Q. Were you the only bidder on the Cho-Ho property? A. No.

Q. There were others? A. Yes.

Q. Did Mr. Cameron engage in the Cho-Ho logging operation with you? A. No.

Q. Did he join in the bid with you?

A. No.

Q. Do you recall what the price of that Cho-Ho purchase was? A. The total price?

Q. Yes, what you paid for it.

A. It was \$24.95, including the road.

Q. Per thousand? A. Per thousand.

Q. That is what you actually paid the government for it? A. Yes.

Q. Was the overall operation a profitable one so far as you were concerned? A. Yes.

Q. In other words, you made money on the Cho-Ho operation? A. Yes. [56]

Q. Do you know how much?

A. Not right now.

(Deposition of Jack Crawford.)

Q. Approximately how much?

A. Approximately \$10,000.

Q. Looking at your complaint in this case, Mr. Crawford, you have alleged that you and Mr. Cameron were damaged in the amount of \$18,000 in this matter. Can you tell me how you arrived at that figure or any other figure as damage in this case?

A. Well, that is the amount of money that we figure we would have netted off of the sale together.

Q. Well, just tell me, if you will, how you computed that net.

A. Well, on previous sales that I have had myself on the same amount of footage and price.

Q. I mean what items did you take into consideration or you took into consideration with regard to this particular tract.

A. Well, we had figured out just what we could do it for.

Q. How did you figure it out? Just go through it, if you will.

A. We had falling-bucking costs at \$3, the hauling costs at \$9, and the yarding and loading at \$7.

Q. Did those figures include anything for your own time?

A. Well, they would include our time. That is what we figured we could do the job for and make money.

Q. No, I mean your own personal time. Did those figures which you have just enumerated include any element of compensation to you at all, or were they just cost figures? [57]

(Deposition of Jack Crawford.)

A. Those were cost figures.

Q. Are those all of the items that you figured into your costs?

A. We figured the road cost.

Q. How much was that?

A. A dollar a thousand.

Q. And other than those items, were there any other items that you figured in?

A. That is all that I can recall right now.

Q. What quantity of timber was the \$18,000 figure which you have computed based upon?

A. What quality?

Q. Quantity. A. Quantity?

Q. Yes. A. 3,000,000 feet.

Q. And these amounts that you have talked about, items of cost for bucking and felling, hauling and the like, those are in dollars on a basis of per thousand board feet, aren't they? A. Yes.

Q. Mr. Crawford, on this Cho-Ho operation, can you tell me what equipment you employed on that operation? A. D-6 cat and portable loader.

Q. And that was all?

A. Power equipment, power saws, pickup.

Q. Was that all the equipment that you had at that time? [58] A. Yes.

Q. How large a crew? How many persons did you have in your crew on the Cho-Ho job?

A. I had two part time and one most of the time.

Q. And yourself?

(Deposition of Jack Crawford.)

A. Yes. That doesn't count the truck driver. That is just on the job.

Q. Have you ever actually logged for Vancouver Plywood Company? A. No.

Mr. Higgins: Mr. Crawford, in a deposition such as this in Federal Court, under the Federal procedure you have to be expressly asked as a part of your deposition whether you care to waive the reading of the deposition and the signing of the deposition. Do you care to waive that?

A. Yes.

Mr. Higgins: That is all.

Mr. Murphy: I don't have any questions. [59]

ROBERT N. CAMERON

one of the plaintiffs herein, was produced as an adverse witness in behalf of defendant, and, having been first duly sworn by the Notary, was examined and testified as follows:

Direct Examination

Q. (By Mr. Higgins): Would you state your full name, please?

A. Robert Norman Cameron. [60]

* * * * *

Q. What is your occupation?

A. Contract logger. [61]

* * * * *

Q. Will you tell me, Mr. Cameron, what your first contact was with the property which is described in your complaint in this case?

(Deposition of Robert N. Cameron.)

A. My first contact with the property?

Q. Itself, yes.

A. I went and looked at the sale, cruised the timber.

Q. What do you mean when you say you went and looked at the sale?

A. I went up to look at the sale and cruise it.

Q. By "look at the sale," do you mean look at the property? A. Look at the property.

Q. How did it come to your attention that the timber was for [64] sale?

A. Through an O. & C. advertisement.

Q. How did you come into contact with Mr. Crawford regarding the property?

A. I have known Mr. Crawford for some time and I wanted Mr. Crawford's opinion of the timber. [65]

* * * * *

Q. Did you have any discussion regarding any distribution of the monies which would be received?

A. We were to split on them. We were going into it as a fifty-fifty deal.

Q. That is, on the overall tract each one of you would receive half of any net profits that came from the overall sale? [71]

* * * * *

Q. And do you know how much money you and Mr. Crawford were in a position to commit to this operation at the time that you were discussing it?

A. Yes, approximately.

Q. And how much was that?

(Deposition of Robert N. Cameron.)

A. Six thousand dollars.

Q. Was that shared equally between you?

A. Yes.

Q. Was that money which each of you had at that time or was it money which you could borrow?

A. It was money that we had at that time or could have borrowed. [78]

* * * * *

Q. Tell me, if you will, your next contact or what next contact you had with regard to this timber?

A. I contacted Mr. Crawford after he talked with Vancouver Plywood determining the price that they would pay to log the timber.

Q. Was this, again, a telephone conversation?

A. Yes, I believe at that time it was.

Q. How long was it after your last conversation with him? A. I believe it was the next day.

Q. And what did this particular telephone conversation involve?

A. They preferred to have us log on a contract price.

Q. Did he state that to you? A. Yes.

Q. Did he tell you what the price was? [79]

A. Yes, \$29. [80]

* * * * *

Q. All right, then, going back to the last discussion that you had with Mr. Crawford in which you discussed that Vancouver had not as yet purchased it, tell me what your next contact was.

A. We discussed whether Vancouver Plywood

(Deposition of Robert N. Cameron.)

was going to purchase the sale, and if they wasn't going to purchase the sale, that we were going to purchase it ourselves.

Q. When did this discussion take place?

A. Approximately July 15th, I assume.

Q. And where did it take place?

A. In Roseburg.

Q. Where in Roseburg?

A. At my home.

Q. Do you remember what day of the week it was?

A. No, I don't.

Q. Who was present during the discussion?

A. Myself and Jack Crawford.

Q. And you say at that time you discussed between yourselves [83] the proposition that if Vancouver Plywood was not going to purchase the timber, you were going to purchase it, is that right?

A. That is correct.

Q. Then at that time, and you believe that it was approximately July 15th, you didn't know, or better, you thought that Vancouver had not submitted any bid on the timber, is that right?

A. No, I didn't know at that time whether they had submitted a bid or not.

Q. Well, you thought that they had not?

A. I thought that they had not, right.

Q. And Mr. Crawford didn't tell you that they had, did he?

A. No, he did not.

Q. You say you discussed between yourselves the idea of submitting a bid yourselves?

A. Yes.

(Deposition of Robert N. Cameron.)

Q. Tell me what your discussion in that regard consisted of.

A. We discussed that if Vancouver Plywood wasn't interested in the sale, that we were going to submit our own bid.

Q. Did you make arrangements between yourselves to submit a bid on that day? A. Yes.

Q. What were those arrangements?

A. We talked about it and then if Vancouver didn't submit a bid in a day or two, that we would go ahead and submit our bid.

Q. Did you discuss what figure you would bid it? [84] A. Yes.

Q. What was that?

A. The appraised price.

Q. And in connection with submitting a bid, it is my understanding that a deposit was required.

A. That is correct.

Q. Do you know what the amount of the required deposit was? A. Yes.

Q. What was that? A. \$5,700.

Q. Did you discuss how you would make up that deposit as between yourselves?

A. Yes, we would both share equally on it.

Q. Was that everything that was discussed regarding this timber deal at that meeting?

A. We discussed whether Vancouver Plywood was interested. If they were not interested, we would submit our own bid.

Q. Well, you mentioned that. A. Yes.

Q. Other than that and other than what you

(Deposition of Robert N. Cameron.)

have just told me here, was there anything else discussed on that occasion that we are talking about at your home regarding this timber? A. No.

Q. What was the next contact you had with anyone regarding the timber? [85]

A. With Jack Crawford on July 15th or 16th, the next day following this last get-together. We discussed going down and submitting our bid.

Q. How did that discussion take place? Was it in person or——

A. No, it was by telephone.

Q. Did you ask Jack Crawford whether Vancouver Plywood Company had submitted any bid up until that time?

A. None that he knew of.

Q. No, but did you ask him? A. Yes.

Q. And he said——

A. Not so far as he knew.

Q. You say you discussed, then, submitting a bid yourselves? A. Yes.

Q. Did you make arrangements to meet to submit a bid? A. That is correct.

Q. Was that all the discussion you had at that time? A. Yes, that is correct.

Q. To your knowledge up to that time Vancouver Plywood Company had not submitted any bid on the purchase of this?

A. Not to my knowledge.

Q. What was your next contact with regard to the timber?

A. We entered a bid at the O. & C. office.

(Deposition of Robert N. Cameron.)

Q. You and Mr. Crawford met somewhere?

A. Yes, in Roseburg. [86]

Q. Where? A. At the O. & C. office.

Q. You just arranged to meet right there at the office?

A. To my knowledge, yes.

Q. And you went into the office together, did you?

A. Yes.

Q. And you entered a bid?

A. That is right.

Q. Do you remember when that was? [87]

* * * * *

Q. When did you first learn that Vancouver Plywood Company had submitted a bid on this purchase?

A. At the O. & C. office.

Q. Who told you that the Vancouver Plywood——

A. The girl that took our checks.

Q. Was it at the time she took your check or before or after?

A. Shortly after. [88]

* * * * *

Q. Did you and Mr. Crawford discuss the matter any further after you were advised that Vancouver Plywood had submitted a bid?

A. Yes, that we would contact Vancouver Plywood to see if they were definitely interested, that we weren't going to offer any competition if they wanted the sale.

Q. At that time did you know the amount of Vancouver Plywood Company's bid?

A. No, I did not.

Q. And you say you and Mr. Crawford discussed the idea that you would contact Vancouver

(Deposition of Robert N. Cameron.)

Plywood Company? A. Yes.

Q. What was the next contact you had with this matter?

A. Mr. Crawford called me within a couple of days, stating that Mr. Smith had contacted him.

Q. And what did he tell you about it?

A. That they were interested in the sale and that if we were [90] interested in logging the timber, which we were, that they wanted to go ahead and purchase the sale and we would meet at the sale the next sale date.

Q. When you and Mr. Crawford discussed the matter of contacting Vancouver Plywood just after you learned that Vancouver Plywood had submitted a bid, was it agreed between you as to who would contact Vancouver Plywood? A. No.

Q. Were you going to contact Vancouver Plywood or was he going to contact them, or both of you? You don't know or——

A. No, I don't remember.

Q. Do you know when I am talking about? This was just after you submitted your bid and after you were told that Vancouver had submitted a bid. But, in any event, sometime later Mr. Crawford called you and told you that Vancouver Plywood had contacted him about it, is that right?

A. Yes, that is right.

Q. Tell me what further contact you had with the matter.

A. At the sale date; at the sale.

Q. Between the last conversation that you had

(Deposition of Robert N. Cameron.)

with Mr. Crawford when he advised you that Vancouver Plywood had contacted him regarding the purchase, you didn't have any further contact with Mr. Crawford or anybody else until the sale date?

A. No, not to my knowledge.

Q. Tell me what your contact on the sale date consisted of. [91]

A. We withdrew our bid. Mr. Crawford withdrew the bid. I got there a little late and then we talked with Mr. Smith about logging it and when he wished to start.

Q. You arrived at the sale a little bit late?

A. That is right.

Q. Did you go into the sale itself?

A. Not at the time of the sale.

Q. Was the sale still going on when you arrived? A. No.

Q. It was all over when you arrived?

A. Yes.

Q. With regard to the date of the sale when was it that Mr. Crawford called you or contacted you and said that Vancouver had contacted him?

A. The day before the sale.

Q. The day before. What was it, again, that he told you about Vancouver Plywood Company contacting him?

A. That they were interested in the sale.

Q. You mean they were interested in purchasing it? A. Yes, that is right.

Q. And what else did he say about it, if anything?

(Deposition of Robert N. Cameron.)

A. Other than that we would have to get together or raise the price of the—if we wanted to buy it, we could raise the price and buy it.

Q. Did you say anything to him about it? [92]

A. Just that if Vancouver Plywood was interested, that we were working with Vancouver Plywood. They could purchase the sale.

Q. You said to him that if Vancouver Plywood wanted to purchase it, they could purchase it?

A. Yes.

Q. Was it your understanding at that time that if Vancouver Plywood Company did purchase it, you had an agreement with Vancouver Plywood Company to log it. Is that it?

A. That is right.

Q. And this was a discussion which you and Mr. Crawford had the day before the sale itself?

A. Yes. I believe that is right. It was approximately that time.

Q. And was this a telephone conversation?

A. Yes.

Q. At the time that you and Mr. Crawford submitted your bid for the purchase of this timber, where did you contemplate that you would get the money required to purchase the timber?

A. I was going to secure a small loan.

Q. What do you mean?

A. Well, at that time to my knowledge we didn't actually discuss it, I don't believe, at that time.

Q. It is my understanding of your testimony, Mr. Cameron, that it would have taken at least

(Deposition of Robert N. Cameron.)

\$44,000 in financial assistance to see you through the purchase of this timber. Is that correct?

A. No, that is not correct. [93]

Q. Will you tell me this: At the time you submitted your bid, would you have required financial assistance had you been awarded the bid to complete the purchase? A. Yes.

Q. And financial assistance in the amount of how much money? A. That is right.

Q. No, how much money, I say, would you have needed by way of financial assistance to go ahead with the purchase?

A. Approximately \$20,000.

Q. Twenty thousand dollars. At the time you submitted your bid, were you in a position to obtain the \$20,000 necessary to go ahead with the contract in the event you were awarded it? A. Yes.

Q. And how were you in such a position? Where were you going to obtain the funds?

A. We had an interested party.

Q. When you mentioned a moment ago that you were going to obtain a small loan, what did you mean by that?

A. Well, actually we had an interested party.

Q. Who was the interested party?

A. Another sawmill.

Q. Pardon? A. A sawmill.

Q. What sawmill?

A. Mt. June Lumber Company. [94]

Q. Who runs the Mt. June Lumber Company? Is that a person or a corporation?

(Deposition of Robert N. Cameron.)

A. I don't know.

Q. Did you personally have any contact with the Mt. June Lumber Company regarding this particular deal, that is, giving you financial assistance on this contract?

A. No, I did not.

Q. Who had, to your knowledge?

A. I believe Jack Crawford had contacted them.

Q. Did he state to you that he had contacted the Mt. June Lumber Company?

A. Yes, that he had talked with them.

Q. Just tell me what he told you about his contact with the Mt. June Lumber Company in this connection.

A. That we probably could secure backing to purchase the timber.

Q. Did he tell you that he had any commitment from the Mt. June Lumber Company?

A. No, he didn't have no commitment.

Q. As I understand it, when you submitted your bid on this purchase, it was your understanding that you and Mr. Crawford, bidding together, were the only bidders for the timber, is that right?

A. That is right.

Q. And at that time to your knowledge you didn't have any more commitment than what you have just told me about it, the Mt. June [95] Lumber Company——

A. Yes, that is right.

Q. ——for the purchase in the event you got the bid?

A. That is correct.

Q. And it was just what Mr. Crawford told you about the Mt. June Lumber Company?

(Deposition of Robert N. Cameron.)

A. Yes.

Q. And have you told me everything that he told you about the Mt. June Lumber Company in connection with this transaction?

A. Yes, to my knowledge.

Q. You don't know the identity of any person connected with the Mt. June Lumber Company to whom he talked or that he told you he talked to?

A. No, I do not.

Q. I understand your testimony to be that you had some contact with Mr. Crawford, and I think you said Mr. Smith, following the sale date.

A. Yes.

Q. Where did that discussion take place?

A. In front of the O. & C. office.

Q. Would you tell me what that discussion was about?

A. As to the date we were to start logging the timber and the price that we had agreed upon.

Q. What date was set?

A. Approximately thirty days. [96]

Q. And what price?

A. Twenty-nine dollars a thousand.

Q. And who said that? A. Bill Smith.

Q. Was there anything else discussed about the logging itself at that time?

A. None other than—no, there was not.

Q. The only two things that were discussed were the price of \$29 and the date approximately thirty days later, is that correct?

A. That is correct, and of course we discussed a

(Deposition of Robert N. Cameron.)

certain amount of how we were going to log the timber.

Q. Tell me, if you will, everything that was said about the logging operation while Mr. Smith was there.

A. He specified that he would like to receive seventy thousand a day if we started logging the tract.

Q. Anything else?

A. And he would like to log it as soon as possible after we started in, as rapidly as possible.

Q. Was that all that was said?

A. That is all that was said at that time, yes.

Q. Now, with regard to the conversation or conversations which you had with Mr. Crawford regarding the Mt. June Lumber Company, when did those take place?

A. Oh, after our first meeting, after looking the sale over with [97] Mr. Crawford.

Q. Well, was there more than one conversation about the Mt. June Lumber Company?

A. No, not that I remember.

Q. And that was sometime after you first looked the property over with Mr. Crawford?

A. Yes.

Q. Was it shortly after?

A. Shortly after, yes.

Q. I mean one of those discussions that you had there within the week or so after you were up there?

A. That is right.

Q. Now, during this time from June 1, 1957 up

(Deposition of Robert N. Cameron.)

through July 17, 1957, were you engaged in logging operations yourself, that is, were you actually working any logging operation?

A. Prior to what date?

Q. No, between July 1st and July 17th.

A. No, I was not.

Q. You weren't working at all? A. No.

Q. Have you worked at any logging operations since July 17, 1957? A. Yes, I have.

Q. Where was that?

A. In the Roseburg area.

Q. More than one? [98] A. Yes.

Q. Working them for yourself or for someone else?

A. Small contracts for another company.

Q. A number of them or just—

A. Two.

Q. And for what company?

A. Hull Lumber Company and Mt. Bette Lumber Company.

Q. Were they on a contract logging basis?

A. Yes.

Q. Approximately how many thousand board feet did both of those jobs, or the total of those two jobs, involve? A. 400,000 board feet.

Q. And how long a period of time did it take you, actual working time, to perform the two?

A. About three weeks.

Q. That is the total of the two?

A. Approximately, yes.

Q. Are you engaged in any logging operation at

(Deposition of Robert N. Cameron.)

the present time? A. Yes, I am.

Q. When did you start that?

A. Last Monday. What day was that?

Q. Is that a large operation?

A. No, it is a small operation.

Q. Involving how many thousand board feet?

A. 400,000 board feet. [99]

Q. And those three are all of the logging operations that you have been in since July 17, 1957?

A. That is correct.

Q. In your complaint in this case, Mr. Cameron, you have alleged damage in the amount of \$18,000. Can you tell me how that amount or any amount was computed as damage?

A. That is the amount that we should have made on the contract price of logging that tract of timber.

Q. How do you actually compute that?

A. The net profit.

Q. Is that net profit per so many thousand board feet? A. Yes.

Q. How much net profit per thousand board feet, do you know?

A. Six dollars a thousand.

Q. After July 17, 1957 did you have any further contact with Vancouver Plywood or anyone else in connection with this transaction?

A. Yes, I contacted Mr. Smith.

Q. Pardon?

A. Yes, I contacted Mr. Smith.

Q. When was that?

(Deposition of Robert N. Cameron.)

A. Approximately a week after the sale date.

Q. What was the occasion of contacting Mr. Smith?

A. I understood that he had a logger in the tract of timber, in the southern area of the tract that they purchased. [100]

Q. How did you come to that understanding?

A. I was told by a friend of mine that there was a logger logging in that area for Vancouver Plywood.

Q. Who was it that told you?

A. Kenneth Kettleson.

Q. Do you know where he lives?

A. Yes, I do.

Q. Where? A. In the Dillard area.

Q. Where? A. In Dillard, Oregon.

Q. Just going back one little bit, to your knowledge did Mr. Crawford make any bid at the sale?

A. Not to my knowledge.

Q. Let me ask you one other thing: What was the contract rate at which you worked these Hul Lumber and Mt. Bette Lumber Company jobs?

A. Twenty-nine and thirty dollars a thousand.

Q. And how about your present project? What is the rate of that?

A. I purchased the timber myself.

Q. Tell me what happened when you contacted Mr. Smith.

A. He said that he was not interested in taking any logs off the sale yet for a few days.

Q. He said what?

(Deposition of Robert N. Cameron.)

A. He was not interested in taking the logs from the sale for [101] at least a few more days.

Q. Did you tell him that you had information that someone else was working it?

A. No, I did not.

Q. What did you say when you called him? You just asked him when he wanted you to start?

A. That is correct.

Q. Tell me what contact you had next with regard to this matter.

A. With this man?

Q. No, with regard to the matter of this timber.

A. I contacted—Mr. Crawford and I contacted Mr. Plummer in Vancouver, Washington.

Q. As I understand it, you got some information that there was a logger working on the tract. You called Mr. Smith but you didn't tell him that you had that information; you just asked him when he wanted you to start logging and he said that he wasn't interested in starting for a few more days. Is that right?

A. That is right.

Q. And then you had contact with Mr. Crawford?

A. Yes.

Q. What did you say to Mr. Crawford?

A. I told him that I understood that Vancouver Plywood had a logger in that area logging that tract of timber.

Q. What did he say to you?

A. He didn't hardly think it was possible. [102]

Q. Do you know when it was with regard to the sale date that you talked to Mr. Smith, how much time elapsed?

A. From the sale date?

(Deposition of Robert N. Cameron.)

Q. Yes. A. I don't remember exactly.

Q. Just approximately.

A. A week or ten days.

Q. Was it very shortly after that that you called Mr. Crawford?

A. Yes, very shortly after that.

Q. And then you say you had some contact with Mr. Plummer? A. Yes.

Q. What did that contact consist of? A telephone call? A. No, a personal call.

Q. Where did that take place?

A. In Vancouver, Washington.

Q. Who was there?

A. Mr. Plummer, myself and Mr. Crawford.

Q. Did you and Mr. Crawford make some arrangements in your telephone call to meet and go up there? Was that it? A. That is right.

Q. As I understand it, at the time you got up to Vancouver, you didn't have any more information about any logging operation on this tract other than what your friend had told you.

A. I had driven up there and seen that he was logging it.

Q. Did you have any conversation with the logger whom you saw [103] there on the site?

A. No, I did not.

Q. None at all? A. No.

Q. Was that before you called Mr. Crawford or after?

A. That was before I called Mr. Crawford.

(Deposition of Robert N. Cameron.)

Q. Tell me just what happened when you and Mr. Crawford went up to see Mr. Plummer.

A. We discussed with Mr. Plummer as to who was going to log the sale. He apparently wasn't aware of who was going to log the sale except that he understood that perhaps Mr. Nygard would log the sale.

Q. Did you say anything to Mr. Plummer about having any agreement to log it?

A. Yes, I did.

Q. What was it that you said to him?

A. That we had agreed upon logging it for Vancouver Plywood and they had agreed definitely that we were to log the timber.

Q. And what did he say about that?

A. That he would investigate the thing and contact us later.

Q. What was your next contact with the matter at all?

A. We talked with Mr. Smith coming back from Vancouver, Washington.

Q. Where was that?

A. In Mr. Smith's home.

Q. Just tell me what that discussion was. [104]

A. Asked him why Mr. Nygard was logging the sale and why we wasn't given the opportunity to log it.

Q. What, if anything, did he say?

A. It was just one of those deals where he had to put another logger in there, that we certainly had all the rights in the world to log it, that we

(Deposition of Robert N. Cameron.)

should be compensated in some way, he didn't know how.

Q. Was there anything else said at that time?

A. No.

Q. What was your next contact with this matter at all? A. We talked to our attorney.

Q. From that time on you haven't had any further contact with Vancouver Plywood regarding the matter? A. No, I have not.

Q. Did Mr. Smith give you any reason in this conversation as to why he was having another logger in the area?

A. He mentioned that Mr. Nygard was the logger for them, that he was logging high-priced timber and they didn't want to shut him down.

Q. There are just one or two other questions, Mr. Cameron. It is my understanding of your testimony that you and Mr. Crawford agreed early in this matter when you were looking at the property that each of you would separately log approximately one-half of the property and that each of you would receive the money which was coming from the timber which you actually logged yourself. [105] Is that right?

A. Yes, approximately.

Q. That is, insofar as money which you received, there would be no splitting of that money. When you delivered logs and were paid for them, that would be your money and you wouldn't split that with Mr. Crawford. Is that right?

(Deposition of Robert N. Cameron.)

A. Well, we agreed to work on the timber on a fifty-fifty proposition.

Q. That is what I am saying. You were splitting the standing timber, each to take half?

A. That was our agreement at that time.

Q. But once you did your half of the timber, who was——

A. We would work together on the whole thing. In the event that one of us had to have help here and there on the deal, it was actually a fifty-fifty proposition.

Q. Then one other question: At the time that you were advised by the girl in the O. & C. office that Vancouver Plywood Company had submitted a bid, it was your understanding that you at that time had an agreement with Vancouver Plywood Company that you were to do that logging for them. Is that correct?

A. Yes, in the event they purchased the sale.

Q. Well, what I am saying to you is this: The minute that you learned that Vancouver Plywood Company had submitted a bid, you understood that you were to do the logging for them. Is that right?

A. Yes, if they were the successful bidders.

Q. Well, you weren't going to bid against them, were you?

A. We were going to bid the appraised price. We didn't think that the timber was valuable enough to raise it over the appraised price.

Q. Let me ask you this: Vancouver Plywood, having bid on this, necessarily had to bid at least

(Deposition of Robert N. Cameron.)

the appraised price? A. That is correct.

Q. Did you plan to compete with Vancouver Plywood Company at all in bidding?

A. No, not after we had found that they were interested in the sale, that they were going to buy the sale after they had entered a bid.

Q. So isn't it a fair statement, then, Mr. Cameron, that once you found out that Vancouver Plywood Company had submitted a bid, it was your understanding that you were going to withdraw your bid because you had Vancouver's agreement that you would do the logging for them?

A. Yes, that is right.

Mr. Higgins: That is all.

Mr. Murphy: That is all.

Mr. Higgins: Mr. Cameron, in a deposition such as this in the Federal Court, under the Federal procedure you have to expressly waive, if you wish to, your right to read and sign this deposition before it is filed as a part of the case. I am going to ask you now whether you do waive your right to read and sign [107] this before it is filed.

A. Yes.

Mr. Higgins: Yes, you do waive it?

A. Yes.

Mr. Higgins: Thank you very much. [108]

[Endorsed]: Filed January 15, 1958.

[Title of District Court and Cause.]

DEPOSITION OF WILLIAM C. SMITH

Taken in behalf of Plaintiffs.

Be It Remembered, That, pursuant to the stipulation of counsel for the respective parties herein-after set forth, the deposition of William C. Smith, an employee of defendant corporation, was taken as a discovery deposition in behalf of plaintiffs before Mary Wakefield, a Notary Public for Oregon and an Official Reporter of the Circuit Court of the State of Oregon for the County of Multnomah, on Friday, December 20, 1957, beginning at the hour of 5:20 p.m. at the law offices of Messrs. Black, Kendall & Tremaine, 1200 Cascade Building, Portland, Oregon. [1]

* * * * *

WILLIAM C. SMITH

an employee of defendant corporation, was produced as an adverse witness in behalf of plaintiffs, and, having been first duly sworn by the Notary, was examined and testified as follows:

Direct Examination

Q. (By Mr. Murphy): Would you state your name, please? A. William C. Smith.

Q. By whom are you employed?

A. Vancouver Plywood.

Q. How long have you been employed by Vancouver Plywood?

A. Three years this time. I have been employed previously by them, too.

(Deposition of William C. Smith.)

Q. What business is Vancouver Plywood Corporation engaged in?

A. In the manufacture of veneer and selling of plywood.

Q. What manufacturing plants do they have?

A. They have a veneer plant in Springfield, Oregon.

Q. Do they have any other plants?

A. No.

Q. Where is their head office?

A. In Vancouver, Washington.

Q. Who are the officers of Vancouver Plywood Corporation?

A. Mr. Frost Snyder is the president.

Q. Would you give us the names of the other officers?

A. Vice-president William Kilworth. [3]

Q. Who are the other officers?

A. The secretary is Mr. Calvin Perry.

Q. Who are the other officers?

A. That is the only officers I know.

Q. What position does Mr. Plummer hold in connection with that organization?

A. He is now the general manager.

Q. Of the entire operation?

A. Of Vancouver Plywood, yes.

Q. You say you worked for Vancouver Plywood for three years. Have you held the same job during all that time?

A. No.

Q. When you first went to work for them what was your occupation?

(Deposition of William C. Smith.)

A. As a field representative.

Q. What was the job? What were the functions of a field representative?

A. To oversee the woods operation of contract loggers that they had out doing various jobs.

Q. Did you make contracts with the contract loggers? A. No.

Q. That would have been all you would do is just oversee the operations of the contract loggers?

A. It is a Forest Service regulation that a man be on the job.

Q. Do you still have that job?

A. No. [4]

Q. What job do you hold now? A. Now?

Q. Yes. A. I am logging manager now.

Q. How long have you been logging manager?

A. About sixty-five days.

Q. Do you remember approximately the date you were appointed logging manager?

A. No.

Q. Before being appointed logging manager, what was your job?

A. I was assistant to the logging manager.

Q. Who was the logging manager?

A. Mr. Plummer.

Q. Where was Mr. Plummer located?

A. In the Vancouver office.

Q. And where were you located?

A. I was in the Springfield area.

Q. What was your job as assistant logging manager?

(Deposition of William C. Smith.)

A. I assisted the logging manager in the logging operations that we had.

Q. What does the logging manager do? Just tell us generally what is his job. Does he buy logs?

A. He does.

Q. Does he bid on timber sales?

A. Yes. [5]

Q. Does he enter into contracts with contract loggers to log timber that Vancouver Plywood Company has purchased? A. Yes.

Q. What business is there being conducted in Vancouver itself? Do you have a Vancouver woods operation up there? Do you buy timber up in Washington? A. No.

Q. What is the source of your timber?

A. Well, we have the Mount Hood National Forest and Willamette National Forest principally.

Q. Is that the only source of your timber?

A. Besides another government agency, which would be O. & C.

Q. And all that timber goes into Springfield, does it? A. No.

Q. Where does it go?

A. To the river, Columbia River dumps.

Q. Then where does it go?

A. It is sold to various plywood plants or saw-mills.

Q. In other words, part of your business is actually buying timber or logs, which are, in turn, resold to other plywood plants, is that correct?

(Deposition of William C. Smith.)

A. Yes.

Q. Who handles that phase of the business or who handled it last summer, in July of last year?

A. Mr. Plummer. [6]

Q. What phase of the business did you handle in July of last year?

A. I was assistant to him.

Q. What authority did Mr. Plummer give to you, if any?

A. I had no authority except to negotiate, and it was all up to his final approval.

Q. You had no authority to purchase timber?

A. Not without first his approval.

Q. If a logger came to you and wanted to sell some logs, did you have any authority to buy logs from him on your own?

A. Yes, at a set market price.

Q. Did you have any authority to enter into contracts with gyppo loggers for the logging of timber?

A. No.

Q. You had no authority?

A. No.

Q. Did you ever enter into any contracts with any gyppo loggers in July of 1957 for the logging of any timber, you personally, on behalf of Vancouver Plywood Corporation?

A. No.

Q. Didn't you in fact enter into a contract with Mr. Nygard to log certain timber in Douglas County?

A. No.

Q. You say you were appointed general logging manager sixty-five days ago? [7]

A. No, I was appointed logging manager.

(Deposition of William C. Smith.)

Q. Who appointed you logging manager?

A. Mr. Plummer.

Q. In what respect did that change the duties of your office?

A. Well, it gave me the authority to negotiate with the loggers on the contracts.

Q. But before sixty-five days ago you had no such authority? A. No.

Q. Was that appointment as logging manager in writing to you? A. No.

Q. It was just oral, just verbal? A. Yes.

Q. Sixty-five days ago Mr. Plummer said, "You are now logging manager," is that right?

A. Yes.

Q. He didn't write you a letter? A. No.

Q. Was there anything of writing made anywhere or any memorial of that appointment?

A. No.

Q. Did you have any increase in salary?

A. No.

Q. Did that change the location of your office in any respect?

A. Yes. I spend more time in Vancouver now than I previously did.

Q. Previously Mr. Plummer handled the operation in Vancouver [8] and you stayed pretty much down in Springfield, is that correct?

A. Springfield and Mill City, yes.

Q. But now you spend more time in Vancouver?

A. Than I previously did, yes.

Q. Who is handling the job of assistant man

(Deposition of William C. Smith.)

Q. What job is Mr. Plummer now handling?
A. No one.

Q. What job is Mr. Plummer now handling?

A. As I previously stated, he is the general manager of Vancouver Plywood.

Q. Before this delegation to you of additional authority sixty-five days ago, you had to refer everything back to Mr. Plummer, is that correct?

A. Yes.

Q. How did it happen that there was a change made in the scope of your authority sixty-five days ago?

A. Principally because Mr. Plummer was made general manager, which necessitated someone else assuming the administration duties of the logging department.

Q. When was Mr. Plummer made general manager?
A. I couldn't answer that.

Q. Was it more than sixty-five days ago?

A. He was acting before then. I wouldn't know when he was appointed general manager.

Q. Approximately when was Mr. Plummer made general manager?

A. Approximately around the 1st of September.

Q. When did you first discuss with Mr. Crawford or Mr. Cameron the possible purchase of this timber, or discuss this timber generally?

A. With Mr. Crawford I discussed it approximately around the 24th or 25th of June.

Q. And what did you say to Mr. Crawford and what did he say to you at that time?

A. He inquired whether we was interested in

(Deposition of William C. Smith.)

buying timber and I stated, "Yes," and he brought up the subject of a piece of timber which is located in Douglas County, which I told him we were looking at. He talked along the lines of a financial arrangement and I told him we would not be interested in financing a logger, that we would buy it if it was of value and put a contract out on it.

Q. Now, you say that you were looking at that particular timber at the time Mr. Crawford came to see you?

A. On the 24th day of June.

Q. Did you make a memorandum of that in your records? A. Yes.

Q. Where did you make a memorandum of that conversation?

A. What I had to go on the exact date is our engineer's field report, the day that he commenced cruising that piece of timber.

Q. Was that on the 24th day of June?

A. 24th day of June.

Q. Was that the day that Mr. Crawford talked to you about that [10] piece of timber?

A. I wouldn't say that.

Q. Before Mr. Crawford saw you, did you know about this timber that is the subject of this litigation? A. Yes.

Q. How did you acquire that information?

A. Like any lumber firm we receive an advertisement originally of the sale, and then when it is sold we receive another advertisement.

(Deposition of William C. Smith.)

Q. When did you receive that advertisement the first time?

A. We never received it. We picket it up.

Q. When did you pick it up?

A. The 1st of June.

Q. Where did you pick it up? In what office?

A. I myself did not pick it up. I had it picked up.

Q. Who picked it up?

A. Mr. Teander Olsen.

Q. Is he in your employ?

A. Yes, he works for Vancouver Plywood.

Q. In what capacity?

A. He is cruiser and manager.

Q. And you say that you had a cruise made of that timber when?

A. He started cruising it on June 24th.

Q. And that was the day after you talked to Mr. Crawford, is that correct? [11]

A. I didn't say that. I wouldn't pin point the date that I talked to Mr. Crawford.

Q. It was after?

A. It was right close together there.

Q. Was it before or after you talked to Mr. Crawford?

A. We had started cruising. I had not cruised when I talked to Mr. Crawford, no.

Q. And you commenced cruising after you talked to Mr. Crawford? A. No.

Q. You had commenced cruising?

(Deposition of William C. Smith.)

A. Yes, we had commenced cruising on the 24th day of June.

Q. And was that before or after you talked to Mr. Crawford?

A. I talked to Mr. Crawford several times.

Q. When was the first time you talked to Mr. Crawford?

A. I cannot recall the exact date.

Q. Was it before or after the 24th day of June, 1957?

A. It was before.

Q. How long before?

A. Possibly a week.

Q. The first meeting you had with Mr. Crawford, did he tell you whether or not he had cruised the timber?

A. Not at that time; not at the first meeting, no.

Q. When did you have the second meeting with Mr. Crawford?

A. We didn't have a meeting. We run into each other.

Q. When did you run into each other? [12]

A. It was sometime after the 24th day of June.

Q. What was said at that meeting?

A. He stated at the time that he had looked at the piece of timber or had looked at part of it, and he knew the sale.

Q. What was said about him logging it, if anything?

A. Nothing was said about him logging it except that possibly we would be interested in a contract figure for him.

(Deposition of William C. Smith.)

Q. Did you ask for a contract figure for the logging of that timber?

A. Yes, I asked him to submit a figure to us.

Q. Did he at that time? A. No.

Q. Did he ever submit a contract figure to you?

A. Not in writing.

Q. Well, did he ever submit a contract figure orally to you? A. Yes.

Q. When did he do that?

A. As close as I can recall, that would be around June the 26th or 27th.

Q. Why did you want a contract figure for the logging from him?

A. We wanted it to compare against our appraisal to see whether we could afford to bid on the sale, what it would cost us to deliver logs to Springfield.

Q. Did you contemplate employing him to log the timber at the time you asked for a contract price? [13] A. No.

Q. How did you contemplate having the timber logged? By whom?

A. It would be if the timber was of value, it was where we could purchase the sale and come out, we would ask for possibly two or three prices and the low bidder would not constitute the awarding factor to us.

Q. We have talked about two meetings. The first time was a week or so before the 24th of June and then sometime after the 24th of June you just ran into Mr. Crawford, isn't that right?

(Deposition of William C. Smith.)

A. By the term "run into," he was at our plant in Springfield and I arrived at the scene about the same time he did. By the term "run into," that is what I mean. I am generally not there all the time.

Q. It wasn't at that meeting, though, that you got this contract price from him, was it?

A. No.

Q. Was it at that meeting that you asked for the contract price?

A. At the second meeting.

Q. What was the next meeting that you had?

A. We never had a meeting.

Q. You never saw Mr. Crawford again prior to the sale? A. Yes.

Q. Just tell me the next conversation you had with Mr. Crawford or Mr. Cameron regarding this timber.

A. The exact date I cannot recall but Mr. Crawford and I [14] discussed it on the phone. At that time is when he gave me the price that he would log the timber for.

Q. What did you say when he gave you that price?

A. I told him as yet we hadn't computed all of our figures and when we would, I would let him know.

Q. Was there anything further said at that time regarding who would get to log the timber or whether you would buy the timber? A. No.

Q. Did you in fact enter a bid for the timber

(Deposition of William C. Smith.)

for this particular timber that is the subject of this lawsuit? A. Yes.

Q. When was that bid entered in relation to the date of the sale of the timber?

A. We entered the bid on July 10th and the sale was July 19th.

Q. Have you told me about all the conversations you have had with Mr. Cameron and Mr. Crawford prior to July 10th, that being the date you entered the bid? A. No.

Q. Were there conversations prior to July 10th that you haven't told me about?

A. There was a conversation with Mr. Crawford at our Springfield plant.

Q. When was that?

A. As close as I can recall, it had been around July the 8th.

Q. What was said at that time? [15]

A. I told him then that we could not afford to buy that sale.

Q. You told him that you couldn't afford to buy it?

A. That is right, because there was a loss.

Q. Because there was a what?

A. There was a loss so far as Vancouver Plywood was concerned.

Q. A loss, what do you mean by that?

A. If we would buy that timber at the appraised price, at the contract figure they had, and log it, we would lose \$10,000 on the sale.

Q. At the contract figure they had?

(Deposition of William C. Smith.)

A. At the contract figure that they would be willing to log the timber for.

Q. You told him that on July 8th?

A. It was that approximate date.

Q. What did he say when you told him that?

A. I can't recall his exact words.

Q. Just tell me the substance of the conversation.

A. The conversation at that time, I am quite sure, turned to some Forest Service timber that he was thinking of purchasing.

Q. On July 8th you told him that you couldn't afford to enter a bid for the timber?

A. Approximately July 8th. Now, that could be—I wouldn't say that it was exactly July the 8th.

Q. You told him you couldn't enter a bid for the timber? A. No. [16]

Q. What did you tell him?

A. I told him that Vancouver Plywood could not afford to buy that timber at the appraised price, being over-cruised the way it was, and pay a contractor to log it at the figure that he had submitted and come out on it.

Q. Well, there must have been, then, some discussion about a contract between you and he to log that, wasn't there? A. No.

Q. In other words, on July 8th he just submitted a proposition to you of \$29 a thousand to log it, is that right?

A. Not on July the 8th, no.

(Deposition of William C. Smith.)

Q. Well, sometime prior to July the 8th, and you didn't accept that or reject it at that time?

A. No.

Q. You said you needed two or three more bids, is that it?

Mr. Higgins: Mr. Murphy.

Mr. Murphy: Excuse me.

Mr. Higgins: I don't mean at this point to in any way limit your examination of Mr. Smith and you are entitled to ask him anything you want, but I am going to have to object to continuing leading questions.

Mr. Murphy: I am sorry.

Q. (By Mr. Murphy): Prior to July 8, 1957 did you or did you not tell Mr. Crawford that you would have to get two or three bids? [17]

A. Would you repeat the question, please?

Q. Well, prior to July 8, 1957, I believe your testimony was that Mr. Crawford told you that he would log this timber for \$29 a thousand, is that correct?

A. No.

Q. He didn't tell you that he would log it for \$29 a thousand?

A. No, he told me he would log it for \$29.50.

Q. At that time am I correct in stating that you told him you would have to get two or three other bids?

A. At that time when he submitted the bid to us—or he didn't submit it—over the phone—he told me what he would be willing to log it for. At that time I told him we hadn't computed all

(Deposition of William C. Smith.)

of our figures on it and that we would have to look at it some more.

Q. O.K. Then you had this conversation on July 8th that you just testified to. Now, have you told us all that you can recall about that conversation? Why did you call Mr. Crawford up and tell him that you couldn't come out on his bid of \$29 a thousand? Why did you want to let him know that?

A. I didn't call him up. He came to our plant in Springfield.

Q. What did you say when you told him that?

A. As I previously stated, I can't recall his exact statements at that time.

Q. Well, in general what did you say? Did you tell him you were going to go ahead and make a bid for this timber? [18] A. No.

Q. Did you tell him that you decided not to bid in the timber? A. No, I told him——

Q. What did you tell him about your plans?

A. I didn't tell him anything about our plans.

Q. Did he ask you about your plans——

A. No.

Q. ——to bid the timber? Was there any discussion at that time about a contemplated future bid on this timber by Vancouver Plywood Corporation? A. No.

Q. You have testified to everything that you can remember regarding this conversation of July 8th have you?

A. Everything that I can recall as of now.

(Deposition of William C. Smith.)

Q. Would there be any memorandum or writing or anything else that would tend to refresh your recollection of this July 8, 1957 meeting?

A. No, because I wouldn't know, like I previously stated, whether it was July 8th or not.

Q. But did you make any memorandum in your records of this July 8, 1957 meeting? A. No.

Q. Did you ever have any writing in letter form or otherwise to Mr. Crawford or Mr. Cameron, or either of them, pertaining to this particular timber? [19] A. No.

Q. Do your records contain any memoranda or any penciled notations or any other kind of written notations as to your agreements or lack of agreements with Mr. Crawford or Mr. Cameron?

A. No.

Q. Is there anything in writing in your own records that in any way pertain to any dealings which you had with Mr. Crawford or Mr. Cameron?

A. No.

Q. All of your dealings with Mr. Crawford and Mr. Cameron were oral, were they not?

A. All my dealings were with Mr. Crawford.

Q. And those dealings were oral, were they not? A. Yes.

Q. What meeting, if any, did you have with Mr. Crawford after July 8, 1957?

A. After July 8th—on July 10th he and our manager went to look at a Forest Service piece of timber. That exact date, I know that.

(Deposition of William C. Smith.)

Q. What timber was that? Do you know by what name that is called, that timber?

A. I can't recall the exact name as of now.

Q. Where was it located?

A. It was a Forest Service sale in the Oakridge district.

Q. Did Mr. Crawford ultimately buy that timber, do you know? [20]

A. I believe he did, yes.

Q. What other dealings after July 8, 1957 did you have with Mr. Crawford concerning the timber that is the subject matter of this suit?

A. None.

Q. There was never anything in writing, is that right?

A. No, there was never anything in writing.

Q. Did you ever talk to Mr. Crawford prior to July 17, 1957 concerning this timber? Did you ever see him and talk to him regarding the timber that is involved in this case?

A. Would you repeat the date, please?

Q. Prior to July 17, 1957. A. No.

Q. Did you ever see him prior to July 19, 1957— A. No.

Q. —regarding this timber? Did you enter a bid on behalf of Vancouver Plywood Corporation for the timber in question?

A. On July the 10th.

Q. That was put in by you, was it?

A. Submitted by Vancouver Plywood.

(Deposition of William C. Smith.)

Q. Was there not an oral sale or bidding on this timber on July 17th or July 19th?

A. On July 19th there was supposedly an oral auction.

Q. Did you attend that? A. Yes. [21]

Q. Did you make a bid on that at that time?

A. Yes.

Q. Did you attend that sale with anybody?

A. Mr. Crawford was there at the sale.

Q. Did you ride down from Eugene with Mr. Crawford? A. No.

Q. He went alone, did he?

A. I don't know.

Q. You don't know how he got there?

A. No.

Q. You didn't go with Mr. Crawford to the sale? A. Yes, we walked in the door together.

Q. But you didn't drive down together?

A. No.

Q. Did you have any conversations prior to the sale between July 8th and the sale date regarding this particular timber? A. No.

Q. Prior to the actual bidding did you or Mr. Crawford or Mr. Cameron have any discussion of any kind concerning this timber? A. No.

Q. Did you know that Mr. Crawford or Mr. Cameron, or both of them, had put a bid in for the timber? A. Yes.

Q. When did you find that out? [22]

A. On July 17th.

Q. At what time?

(Deposition of William C. Smith.)

A. At approximately four o'clock in the afternoon.

Q. Was that after the bidding had taken place?

A. No.

Q. When did the bidding take place?

A. On July 19th.

Q. On July——

Mr. Lankton: What bidding are you talking about? I am sorry.

Q. (By Mr. Murphy): There was, in fact, an auction of this timber, was there not?

A. On July 19th.

Q. What happened on July 17th? I think you mentioned something on July 17th.

A. That is when I knew that Mr. Cameron and Mr. Crawford—or that is when I knew that Mr. Cameron had submitted a bid.

Q. How did you find out that Mr. Cameron had submitted a bid?

A. Our Springfield office called the O. & C. office in Roseburg and inquired, because that was the day that the time limit was up on it.

Q. Did Mr. Crawford ever tell you that he had submitted a bid? A. No.

Q. Did Mr. Crawford ever come to your office in Springfield and tell you that he had submitted a bid? A. No. [23]

Q. So between July 8, 1957 and the date of this auction that we have been speaking of on July 19, 1957, you had no discussions with Mr. Crawford or Mr. Cameron concerning this timber?

(Deposition of William C. Smith.)

A. No.

Q. Now, tell us just what happened at this auction that occurred on July 19, 1957.

A. The auction was held at Roseburg and the two qualified bids were put on the board.

Q. What bids were they?

A. The Vancouver Plywood, and whether it was Cameron and Crawford or Crawford and Cameron, I wouldn't say, but there was two names.

Q. And then what happened?

A. Vancouver Plywood bid the appraised price.

Q. What was your bid that was submitted on July 10th? A. The appraised price.

Q. What was the bid of Crawford and Cameron? A. I don't know.

Q. You don't know whether it was less than the appraised price or more than the appraised price? A. No, I don't know.

Q. On July 19th did you make any oral bid?

A. Yes, I bid the appraised price.

Q. I probably don't understand the nature of bidding. You put in a bid on July 10th or July 8th—was it July 8th or 10th?

A. It was the 10th. [24]

Q. You put in a bid on July 10th, and then did you, in turn, raise that bid on July 19th?

A. No.

Q. Did you, in turn, bid the same bid on July 19th that you bid on July 10th?

A. Would you repeat the question?

Mr. Murphy: Would you read the question?

(Deposition of William C. Smith.)

(The last question was read.)

A. Yes.

Q. Did Mr. Cameron or Mr. Crawford enter any bids on July 19th or raise any bids that they had previously entered? A. No.

Q. I gather that Vancouver Plywood Corporation was awarded the timber, is that correct?

A. Yes.

Q. Then did you have any discussion after the award of the timber with Mr. Cameron or Mr. Crawford concerning them logging this timber?

A. No.

Q. No discussion whatsoever? A. Yes.

Q. What discussion did you have with Mr. Cameron and Mr. Crawford?

A. Principally of what Vancouver Plywood planned on doing with the timber.

Q. What did they say to you and what did you say to them at [25] that time?

A. They asked what we planned on doing with it and I told them we planned on holding it probably for approximately thirty days.

Q. What did you tell them you were going to do with it, if anything?

A. I didn't tell them.

Q. Did they ask you whether they could log the timber for you? A. Not that I recall.

Q. Was there any discussion at that time as to Crawford and Cameron logging this timber for you? A. No.

Q. Was there any mention of logging or any

(Deposition of William C. Smith.)

role that they would play in connection with this particular timber?

A. Not with this particular timber.

Q. Was there any discussion about any other timber?

A. Yes. There was no specific tracts mentioned. I had never met Mr. Cameron before, so he was asking me about what our prices were, what we was willing to pay for logs delivered in Springfield, and I told him.

Q. But there was no discussion of logging the timber that you had just purchased?

A. No.

Q. Was there any discussion at any subsequent date between you and Mr. Crawford and Mr. Cameron of logging this particular timber? [26]

A. Yes.

Q. What was that discussion and when?

A. That discussion was sometime in the month of August when they came to my home and asked why they could not log that timber, why they wasn't given the opportunity to log it.

Q. And who was present at the time of that discussion? A. No one.

Q. What did they say to you and what did you say to them? Was there anybody present other than the three of you?

A. It was at my home and my wife was there, but she wasn't in the room.

Q. I see, and what was said at that time?

A. At that time Mr. Cameron and Mr. Craw-

(Deposition of William C. Smith.)

ford felt they should have been given an opportunity to log that sale. I told them that we had sold that because otherwise we would have lost \$10,000. That I previously stated.

Q. To whom did you sell the sale to?

A. Nygard Logging Company.

Q. When was that contract of sale made?

A. July 8th.

Q. Between who and who?

A. Between Nygard Logging Company and Vancouver Plywood.

Q. How much did you receive for selling the sale?

A. We received nothing.

Q. Was that agreement in writing? [27]

A. Yes.

Q. What in general did it provide?

A. It provided that Vancouver Plywood would finance the sale and pay so much for the logs delivered back at Springfield, Oregon.

Q. Was that agreement made on July 8th?

A. Yes.

Q. In general what were the prices that were to be paid by Nygard for this timber?

A. Are you referring to stumpage prices or to log prices?

Q. Log prices, delivered to your mill.

A. I believe, without seeing the contract, that this is close—I wouldn't say that this was the exact figures that was in the contract. I believe it was No. 3 mill logs, he would receive \$45 per thousand net scale. No. 2 mill logs, he was to receive \$55 a

(Deposition of William C. Smith.)

thousand net scale. Select peelable logs, he was to receive \$65 a thousand. For No. 3 peelers, \$85 a thousand; No. 2 peelers, \$95 a thousand; No. 1 peelers, \$110 a thousand.

Q. Did you ever tell Cameron and Crawford of this contract?

A. No, not prior to the—I never told them then.

Q. Who drew this contract up?

Mr. Higgins: Let him finish it.

The Witness: Pardon?

Mr. Murphy: Excuse me.

Mr. Higgins: Were you going to say something else? [28]

The Witness: He had made the statement that I had never told them. I had told them when they were at my home that we had sold it to them. I didn't say it was a contract but I told them it had been sold to Nygard, but I didn't give any specific prices or anything else at that time.

Q. (By Mr. Murphy): You said "he made a statement." Who made a statement?

A. I meant you had started to ask a question and then you had changed.

Q. When did you tell Cameron and Crawford that you had sold this timber to Nygard?

A. It was sometime in the month of August when they were at my home.

Q. Before that time did you ever tell them about the sale to Nygard? A. No.

Q. Who drafted the agreement between Vancouver and Nygard for the sale of this timber?

(Deposition of William C. Smith.)

A. Mr. Plummer.

Q. When was that contract drawn up?

A. On July 8th.

Q. Was it signed July the 8th? A. Yes.

Q. And in whose presence was it signed?

A. The office girl, Miss Donna Kimport, and Mr. Donald Rupe. [29]

Q. Did Cameron or Crawford, or either one of them, ever tell you that they were going to put in a bid on this timber? A. Not that I recall.

Q. Did you ever ask them not to put in a bid?

A. No.

Q. Did they ever discuss with you putting in a bid on the timber?

Mr. Higgins: You mean before the sale?

Mr. Murphy: Before the sale.

A. Of them putting in a bid?

Q. (By Mr. Murphy): Yes. A. No.

Q. Is it your statement that you at no time had a contract with either Cameron or Mr. Crawford to log this timber? Is that your testimony?

A. Yes.

Q. You have testified to a number of conversations between Cameron and Crawford, I mean between yourself and Mr. Crawford. Was anybody other than the two of you present at the time of any of those conversations? Were any third persons present?

A. Except after the sale on July 19th when Mr. Cameron was present.

Q. As to the conversations that you testified to

(Deposition of William C. Smith.)

between yourself and Mr. Crawford, there were no third persons present, is that correct?

A. Not that I recall. [30]

* * * * *

[Endorsed]: Filed January 15, 1958.

[Endorsed]: No. 16036. United States Court of Appeals for the Ninth Circuit. Robert N. Cameron and Jack Crawford, Appellants, vs. Vancouver Plywood Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: May 23, 1958.

Docketed: June 3, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 16036

ROBERT N. CAMERON and JACK CRAW-
FORD, Appellants,

v.

VANCOUVER, PLYWOOD CORPORATION, a
Washington corporation, Appellee.

COUNTER-DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

To: Robert H. Cameron and Jack Crawford, ap-
pellants, and Yates, Murphy and Carlson and
Edward M. Murphy, attorneys for appellants.

You and each of you take notice that the Ap-
pellee adopts as its supplemental designation of
portions of the record to be printed on appeal,
the Counter-Designation of Contents of Record on
Appeal appearing in the typed record and filed in
the United States District Court for the District
of Oregon on May 29, 1958 by Appellee.

MILTON C. LANKTON and
BLACK, KENDALL & TREMAINE,
/s/ MILTON C. LANKTON,
Attorneys for Appellee.

Affidavit of Mailing Attached.

[Endorsed]: Filed June 12, 1958. Paul P.
O'Brien, Clerk.

No. 16036

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT N. CAMERON and
JACK CRAWFORD,

Appellants,

vs.

VANCOUVER PLYWOOD CORPORATION,
Appellee.

PLAINTIFFS' BRIEF

Appeal from the United States District Court
for the District of Oregon

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FILED

OCT 9 1958

PAUL P. O'BRIEN, CLERK

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No. 16036

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT N. CAMERON and
JACK CRAWFORD,

Appellants,

vs.

VANCOUVER PLYWOOD CORPORATION,

Appellee.

PLAINTIFFS' BRIEF

Appeal from the United States District Court
for the District of Oregon

STATEMENT OF JURISDICTION

This action was filed in the Circuit Court of the State of Oregon for Douglas County and was removed to the United States District Court for the District of Oregon on the petition of the defendant alleging that the District Court had original jurisdiction under the provision of Title 28, United States Code, Section 1332, and Title 22, United States Code, Section 1441 in that it was a civil action wherein the amount in controversy exceeded the value of Three Thousand (\$3,000.00) Dollars exclusive of interest and costs and was between

citizens of different states, the plaintiffs being citizens of the State of Oregon and the defendant being a corporation incorporated under the laws of the State of Washington and not incorporated under the laws of the State of Oregon.

STATEMENT OF FACT

This is an action brought by the plaintiffs as co-partners to recover damages for the breach of an oral contract to log a tract of timber in Douglas County, Oregon. The plaintiffs are contract loggers living in southern Oregon. Defendant is a plywood company operating a veneer plant in Springfield, Oregon. It is alleged in the Complaint that the plaintiffs and defendant agreed that the plaintiffs would log a certain tract of timber which the defendant purchased at a government timber sale. The plaintiffs were to be paid Twenty-Nine (\$29.00) Dollars per thousand feet, net scale, for all logs delivered to the defendant's plant in Springfield. It is alleged in the complaint that defendant refused to permit the plaintiffs to log this tract of timber and as a result of the breach of the logging contract the plaintiffs sustained damage in the amount of Eighteen Thousand (\$18,000.00) Dollars (Tr. 7, 8). The defendant filed an answer in the form of a general denial (Tr. 8). Thereafter the defendant filed a Motion

for Summary Judgment assigning the following ground:

“* * * there is no genuine issue as to any material fact and that upon plaintiffs’ depositions and in view of the relevant facts therein stated, the contract upon which plaintiffs rely herein is contrary to public policy and unenforceable as a matter of law.” (Tr. 11)

In support of its motion the defendant claimed in the lower Court that the deposition of the plaintiff Crawford revealed an illegal contract to stifle bidding at a government sale of timber. The motion was predicated entirely on the depositions of the plaintiffs which the defendant took before the trial.

From a Judgment of the District Court sustaining defendant’s Motion for a Summary Judgment the plaintiffs have appealed.

**A Motion for Summary Judgment Will Not Be Granted
If There Is Any Legitimate Issue of Fact Presented
By the Pleadings.**

Guerrero v. American-Hawaiian Steamship Co.,
9 Cir., 222 F. 2d 238

Zimmerman v. Emmons, 9 Cir. 225 F. 2d 97

Carr v. City of Anchorage, 9 Cir., 243 F. 2d 482

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245 F. 2d 330

New & Used Auto Sales v. Hansen, 9 Cir., 245 F.
2d 951

United States v. Gardner, 9 Cir., 244 F. 2d 952

Rules of Civil Procedure, Rule 56 (c)

It is elementary that on a Motion for Summary Judgment the moving party must demonstrate that there is no issue of fact. Conversely, any doubts are resolved against the movant. Summary judgment must be denied if the evidence that such conflicting inferences could be drawn therefrom. In the recent case of *Cox v. English-American Underwriters*, (9 Cir.) 245 F. 2d 330, the Court stated the following:

“In haste to dispose of a crowded calendar, a trial judge may be misled into believing a summary judgment is a quick solution for a problem. But

this highly effective device should not be used as a substitute for trial on the facts and law. Especially is this true where the parties are entitled to trial by jury. It may be that plaintiff cannot win this lawsuit before a jury. The mere fact that the trial judge conceives this to be true does not endow him with authority to take the place of the jury and decide hotly contested issues of fact." (p. 333)

It is the position of plaintiffs that their testimony given in their depositions does not indicate the existence of any illegal contract to limit bidding. Viewed in the light most unfavorable to plaintiffs, the issue of illegality is, to borrow Judge Fee's language, a "hotly contested issue of fact" on which the plaintiffs are entitled to a jury trial.

An Agreement Between Two or More Persons Having a Common Economic Interest in Property to Be Sold At Public Sale That One of Their Number Will Enter a Bid Is Not Against Public Policy.

Berg v. Plitt, 12 A (2) 609

Henderson v. Henrie, 56 SE 369

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Lay v. Brown, 151 SW 1001

Powers v. Ullman, Stern & Krausse Inc., 16 SW (2) 910

Sturgis v. Wylie, 120 SW (2d) 571

Jones v. Clary, 75 SE (2d) 504

6 Corbin on Contracts, Sec. 1375, p. 450

5 Williston on Contracts (Rev. Ed.) Sec. 1663,
pp. 4691 - 4692

Restatement of Contracts, Sec. 517

45 ALR 551

The plaintiffs are young contract loggers operating in southern Oregon. They had never been in partnership before but had looked at various tracts of timber together. They owned a limited amount of equipment (Tr. 19) and their total cash at the time the contract was entered into was \$6,000 (Tr. 54). At the time this contract arose, they, like a number of other contract loggers in southern Oregon, were on the lookout for a logging job. One of the plaintiffs learned from a Government announcement that a 200-acre tract of timber was to be sold by the Government (Tr. 19). The minimum bid price was approximately \$98,000.00 with \$5,600.00 to be paid at the time the bid was made and an additional \$14,400.00 to be paid at the time cutting commenced. (Tr. 29). The plaintiffs cruised this timber (Tr. 20) and then concluded that the defendant's Springfield plant might be interested in buying the

timber and contracting with the plaintiffs for the logging of it. Plaintiff Crawford had been acquainted for sometime with Bill Smith, the defendant's logging manager in Springfield, and Crawford stated in his deposition that Smith had told him that "any time that I found a piece of timber that I was interested in they would look at it and let me know whether they were interested." (Tr. 21)

On July 1 Crawford went to Smith and told him of the Government sale of this timber and gave him the result of the plaintiffs' cruise (Tr. 21). Smith told Crawford that he would "take his cruiser and go down and look it over" and that if Vancouver was interested they would "either let us sell the logs back to them or he (Smith) would let us log for them for so much a thousand" (Tr. 21, 22).

Vancouver wasted no time in cruising the timber, "three or four days later" Smith called Crawford, told him that Vancouver was interested in buying the timber, and an agreement was made over the telephone for Cameron and Crawford to log the timber for \$29.00 a thousand (Tr. 24, 25).

The next day (approximately July 5, 1957) Crawford and Smith met near the log pond of Vancouver Plywood Corporation and they discussed the logging contract with Vancouver (Tr. 24).

Smith requested that the plaintiffs deliver around 75,000 feet of logs a day to defendant's log pond. They also agreed on how the roads should be constructed (Tr. 24).

As time went by, the plaintiffs became worried that they might lose the opportunity of logging the timber, either as a result of the failure of Vancouver to put in a bid for the timber, or as the result of Vancouver's unwillingness to bid more than the minimum Government appraisal price (Tr. 54, 55). The plaintiffs had incurred substantial time and expense in cruising the timber and they did not want this effort to go for naught. Cameron testified,

"Q. Tell me what your discussion in that regard consisted of.

A. We discussed that if Vancouver Plywood wasn't interested in the sale, that we were going to submit our own bid.

Q. Did you make arrangements between yourselves to submit a bid on that day?

A. Yes.

Q. What were those arrangements?

A. We talked about it and then if Vancouver didn't submit a bid in a day or two, that we would go ahead and submit our bid." (Tr. 56)

Finally on July 15, 1957, Cameron and Crawford bid the minimum Government appraisal price. Crawford explained in his deposition that the bid was put in "to

insure ourselves of the tract of timber in the event that they didn't go ahead and buy" (Tr. 32). Immediately on placing the bid, Crawford advised Smith of the fact that the plaintiffs had put in a bid and explained to Smith "I told him that in the event they (Vancouver) decided not to buy the sale that Bob and I had decided that we were going to buy it and that we were going to enter a bid too so the next day I went down and put my check down for the sale, too" (Tr. 26). Cameron in his deposition, explained the placing of a bid as follows:

"Q. Is it a fair statement of your testimony that the reason you made that bid was so that you would get the sale if Vancouver Plywood did not?

A. Yes." (Tr. 42)

When the bid was put in on July 15th, which was at least two days and possibly four days before the sale (there is a variance in the testimony as to the exact date of the sale) the plaintiffs testified that they understood that they had a firm agreement with Vancouver to log the timber. Cameron testified,

"Q. Then one other question: At the time that you were advised by the girl in the O. & C. office that Vancouver Plywood Company had submitted a bid, it was your understanding that you at that time had an agreement with Vancouver Plywood Company that you were to do that logging for them. Is that correct?

A. Yes, in the event they purchased the sale.” (Tr. 73)

“Q. So isn’t it a fair statement, then, Mr. Cameron, that once you found out that Vancouver Plywood Company had submitted a bid, it was your understanding that you were going to withdraw your bid because you had Vancouver’s agreement that you would do the logging for them?

A. Yes, that is right.” (Tr. 74)

Up to this point, the evidence indicates that the parties had a firm logging agreement contingent on Vancouver being the successful bidder at the Government sale.

On the date of the sale, Smith and Crawford drove together from Eugene to Roseburg, where the sale took place (Tr. 36). There were no other bidders at the sale (Tr. 39). Mr. Smith raised his bid “a nickel” and the timber was awarded to defendant, Vancouver Plywood Corporation (Tr. 39). After the sale, Cameron, Crawford and Smith agreed that Cameron and Crawford should begin logging the timber in thirty days (Tr. 40). Subsequently, the defendant placed another logger in the timber and this lawsuit resulted.

It is the position of the plaintiffs that a firm logging agreement was made at a date no later than July 6, 1957, subject, however, to Vancouver acquiring the timber at the Government sale on July 17th.

The defendant's contention that the plaintiffs' claim is based on an illegal contract to suppress bidding is predicated on a conversation which Crawford testified he had with Smith on July 17th while they were riding from Eugene to Roseburg to attend the Government sale. This conversation was as follows:

"Q. Just tell me what that discussion consisted of.

A. Well, I agreed that if Bob and I got the job of logging it, we would withdraw our bid.

Q. Well, just tell me who said what and what was said, if you will.

A. Well, I can't remember of too much being said other than that.

Q. You say you agreed that if you and Mr. Cameron got the logging job, you would withdraw your bid on the timber, is that correct?

A. Yes.

Q. And what did Mr. Smith say to that?

A. He said that would be all right.

Q. Do you say that he agreed that you would get the job?

A. Yes. [42]

Q. Then what, if anything else, was said?

A. That is a hard thing to answer. We talked about several things but it was small talk.

Q. Well, did you say anything more about this timber or the bidding on it or anything in connection with it?

A. No.

Q. Just what you have told me here now?

A. Yes.

Q. And just to be sure that we have it correctly and have all of it, you told Mr. Smith that if you and Mr. Cameron got the logging job, that you would withdraw your bid, and you say that he said that was agreeable, that you could have the job, is that correct?

A. Yes. I think there is one thing there I ought to correct. I think I said I submitted that bid on the 17th. It was a day or two before the 17th when that bid was put in." (Tr. 37, 38)

It should be noted that this conversation contains none of the elements of a contract. There is no mention of price, delivery dates, quantities of daily deliveries, road construction, or any of the other usual ingredients of a logging contract.

This conversation, when viewed in light of the previous dealings between the parties, reveals no illegal agreement. It will be recalled that approximately nine days before this conversation, Crawford and Smith of Vancouver had agreed that the plaintiffs would log the timber for \$29.00 per thousand if Vancouver acquired it. In Crawford's conversation set forth above, Crawford is merely saying to Smith, "We intend to abide by our previous agreement. That agreement provided that Vancouver would buy the timber and we would log it.

We will not prevent Vancouver from buying the timber and we will expect Vancouver to live up to its part of the agreement and permit us to log the timber."

In the case of *Pyle v. Kernan*, 148 Or 666, the Court stated at page 673,

"Courts have refused to declare any hard and fast rule for determining whether a contract is void as against public policy. Like fraud, public policy is difficult of definition. Each case must be determined in the light of its own particular state of facts. Hence, cases not based upon a similar fact situation are not helpful."

The rule is well established that any contract having as its *primary* object the stifling of competition at a public sale is illegal. (Restatement of Contracts, Sec. 517). However, there is a well-established exception to this rule and this case falls squarely within that exception. The exception is that two or more individuals having a joint interest in a piece of property to be sold at public sale can agree that one of their number will bid the property for the benefit of all. This exception is stated in *Restatement of Contracts*, Sec. 517.

"A bargain between two or more persons that one shall bid at public auction for the benefit of all upon something about to be sold, which the parties desire to purchase together, either because they intend to hold it together or afterwards to divide it into such parts as they wish individually to hold, neither desiring the whole, or for any similar pur-

pose, is legal in its character and will be enforced; but such a bargain, if made merely for the purpose of preventing competition and reducing the price of what is to be sold, is against public policy because operating as a fraud on the party offering it, and, therefore illegal."

To illustrate the exception, the Restatement gives the following example at page 1003:

"A and B, attending an auction and each intending to bid for the purchase of a valuable painting agree with one another to bid for its purchase jointly and deal with it as a joint venture. Their agreement is legal although they anticipate that the painting will be sold more cheaply because they refrain from competition with one another."

This exception is stated in 45 *ALR* 551, as follows.

"The co-operation of public contractors to accomplish an object which neither could gain if acting in his individual capacity is not within the rule, though it may prevent the rivalry of the parties, and thus lessen competition."

In this case, before the sale, the plaintiffs had agreed to log timber which Vancouver Plywood contemplated buying from the Government. Thus, each of the parties had an economic interest in the Government timber. The timber to Vancouver was a source of peelers for its mill, and the timber to the plaintiffs provided a logging job. Certainly, under these circumstances and in light of the rule stated above, there

would be no objection to an agreement that Vancouver would acquire the timber and that Cameron and Crawford would not acquire it. If two individuals can legally agree among themselves that one will purchase the timber for the benefit of both, most certainly a logger can agree with a mill owner that the owner will acquire the timber and the logger will in turn log it. Implicit in the latter agreement is the agreement on the part of the logger that he will not acquire the timber. If the plaintiffs had refrained from bidding entirely because of their logging contract with Vancouver, it certainly could not be contended that the logging contract was illegal because it in effect removed the plaintiffs from the field of potential bidders. Is the situation here any different? When Crawford and Smith agreed on the terms of the logging contract the plaintiffs did not intend to make a bid. When it appeared that Vancouver might not bid at all at the sale, the plaintiffs entered a bid. When Vancouver did bid, the plaintiffs told Vancouver they would withdraw their bid because their logging contract necessarily required that Vancouver purchase the timber.

The defendant has placed much emphasis in the District Court and undoubtedly will do the same in this Court on the fact that Paragraph II of the complaint alleges.

"That on or about the 17th day of July, 1957, in Douglas County, Oregon, the plaintiffs and the defendant entered into an oral contract." (Emphasis supplied.)

The plaintiffs have urged that the date July 17, 1957, is the date of the above-quoted conversation between Smith and Crawford and hence we are relying on this conversation to evidence the logging contract.

The reason the date of July 17th was used in the complaint was because that was the date when Vancouver acquired the timber at the Government sale. The agreement which Vancouver and the plaintiffs had made on July 5th or 6th was contingent on Vancouver becoming the successful bidder on the Government sale on July 17th. The acquiring of the timber was the final act in bringing the contract into existence.

Assuming for the purposes of argument that we were in error in concluding that the contract came into existence when the timber was acquired on July 17th and that the contract was in fact made on July 5th or 6th, subject to being defeated by an event occurring on July 17th, i. e., Vancouver *not* acquiring the timber, or that the contract was made on July 5th or 6th subject to a condition subsequent occurring on July 17th, i. e., Vancouver acquiring the timber, certainly this error in properly *dating* the contract does not provide grounds for dismissal of the complaint.

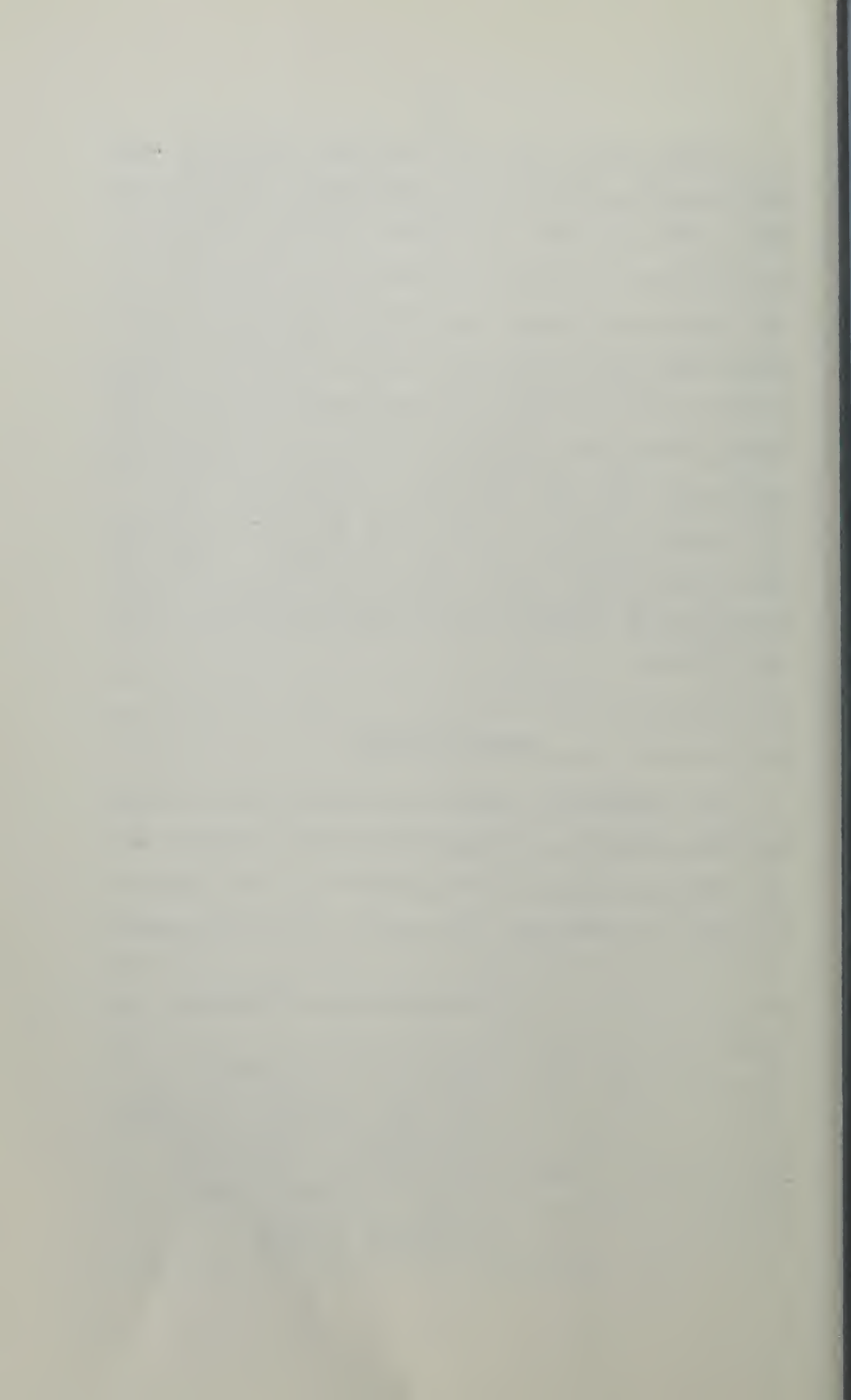
In the lower court the defendant attributed some significance to the fact that there were only two bidders at the sale and one bidder withdrew. It will be recalled that the reason the plaintiffs put in a bid at all was because they feared that there would be no bidders at the sale. They feared that Vancouver was not going to put in a bid (Tr. 56). Crawford testified that he told Smith "that in the event they (Vancouver) decided not to buy the sale that Bob and I had decided that we were going to buy it" (Tr. 32). An effort to assure that there would be at least one bidder at the sale should not be twisted into an illegal scheme to "chill" the bidding.

CONCLUSION

We respectfully submit that there was no illegal agreement between the plaintiffs and the defendant and the judgment should be reversed and the cause remanded to the District Court for a trial on the merits.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

ROBERT N. CAMERON and JACK CRAWFORD,
Appellants,

v.

VANCOUVER PLYWOOD CORPORATION,
Appellee.

APPELLEE'S BRIEF

*Appeal from a Judgment of the United States
District Court for the District of Oregon.*

HONORABLE GUS J. SOLOMON, Judge.

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FILED

NOV 21 1958

PAUL P. O'BRIEN, CLERK



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I. Appellants seek damages for breach of an alleged agreement wherein they agreed to refrain from bidding at an oral auction of government owned timber in return for a promise by one of appellee's employees that they would be permitted to log the timber. The court below properly held that such an agreement tends to restrain or "chill" the bidding at an auction of public property, and is contrary to public policy and unenforceable.	7
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- log the timber does not come within any of the recognized exceptions to the rules declaring such bargains to be illegal and void; especially where appellants and appellee were the only parties permitted to bid at the auction. 19
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- (2) The "exception," holding that persons having a common economic interest in the property may legally agree to refrain from bidding at a public sale of the property, is applicable only to public sales of private property where the group to which the "exception" applies are those intended to be benefited by the rule, and not to sales of government property where the government alone is intended to be protected. 22
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No. 16036

United States
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ROBERT N. CAMERON and JACK CRAWFORD,
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VANCOUVER PLYWOOD CORPORATION,
Appellee.

APPELLEE'S BRIEF

*Appeal from a Judgment of the United States
District Court for the District of Oregon.*

HONORABLE GUS J. SOLOMON, Judge.

SUPPLEMENTAL STATEMENT OF THE FACTS

The appellants were plaintiffs in the action below. They sued to recover damages for the breach of an alleged oral contract to log timber. The timber concerned was government timber on revested Oregon and California Railroad lands and reconveyed Coos Bay Wagon Road Land Grants, commonly called "O. & C." timber. 43 C.F.R. § 115.37 (d), (e).

The basic O. & C. lands act of June 9, 1916 (39

Stat. 218) established a system of public competitive bidding for the sale of O. & C. lands, and this policy has continued under regulations prescribing the method of sale of lands managed by the Bureau of Land Management. 43 C.F.R. § 115.39 (a).

The sale involved here was advertised and competitive bids solicited, but no bids were received within the time specified in the notice (Tr. 19, 20). In a case such as this, where the original sale is "passed over" without anyone bidding, the regulations provide that the Bureau may extend the period for the receipt of bids for 90 days. 43 C.F.R. § 115.45. If, during this 90 day period, a written bid at not less than the appraised price is submitted, notice of the bid is posted in the office of the Bureau's district forester for a period of 5 working days, and if no other bid is made during the 5 day period, the sale is awarded to the sole bidder. 43 C.F.R. § 115.45 (1). However, if one or more other bids are submitted during the 5 day period, then *all* the bidders, high and low, are permitted to bid competitively at an oral auction of the timber. 43 C.F.R. § 115.45 (2).

On about July 1, 1957, during the 90 day extension for this "passed over" sale, the appellants, Crawford and Cameron, cruised the O. & C. timber here involved (Tr. 19, 20). A day or two later, Crawford contacted Bill Smith, an employee of the appellee Vancouver Plywood Co. Crawford called Smith's attention to the timber, and asked if Smith were interested in the timber (Tr. 21, 22). Smith said that he was and that he would take his cruiser and go down and look the

sale over, and that if he were interested, he would let Crawford know (Tr. 22).

The next contact between Crawford and Smith was a telephone call in which Crawford, in answer to Smith's request for a bid, stated that he could log the timber for \$29.00 per thousand board feet (Tr. 22). Smith remarked that his cruise showed there was 18 per cent less timber in the area than indicated by the O. & C. appraisal (Tr. 23). Nothing further was said (Tr. 23).

A day or two later, Crawford contacted Smith again, and discussed the sale and the various requirements that Vancouver Plywood would make with regard to the logging of the timber if they could get the timber (Tr. 24).

A few days later, on the Sunday afternoon immediately prior to the sale date, Crawford visited Cameron at his home, and they talked about submitting a bid to purchase the timber (Tr. 27, 28). Having determined to enter a bid on the sale at this Sunday meeting (Tr. 27), Crawford went to the Vancouver Plywood plant to tell Smith of that decision (Tr. 26). Sometime prior to this meeting between Smith and Crawford, Smith had informed Crawford that Vancouver Plywood had submitted a bid and the appropriate deposit check to buy the timber involved (Tr. 31, 32, 33). Nevertheless, at this meeting, which was before the date of the oral auction—either the day before (Tr. 25-26, 34) or a day or two before (Tr. 38), Crawford told Smith that he and Cameron were going to enter a bid for the timber also (Tr. 26, 36). Crawford states that Smith told him to go ahead (Tr. 36).

The bid that Crawford and Cameron submitted was the appraised price, which was approximately \$98,000.00 (Tr. 28, 38). Crawford assumed that Vancouver Plywood's bid was also the appraised price (Tr. 38). It is to be noted that bids on a "passed over" sale are almost invariably at the appraised price and no more, since if only one bid is received, the contract is awarded to the sole bidder (43 C.F.R. § 115.45 (1)), and if more than one bid is submitted within the 5 day period, all bidders, high and low, may bid again competitively at the oral auction. 43 C.F.R. § 115.45 (2).

The deposit required to insure that a bidder would make good his written bid was \$5,600 (Tr. 29). Crawford and Cameron did not have sufficient money to purchase the \$98,000.00 sale themselves, but they were to be financed by an "interested party" in the event they were the successful bidders (Tr. 29-30, 62). The interested party was either the U. S. Plywood Co. or the Mt. June Lumber Co. (There is a conflict in the testimony of Crawford and Cameron on this point, Tr. 30, 62.)

Crawford states that his next contact with Smith, after advising Smith that he and Cameron were going to submit a bid for the timber, was on the day the oral auction was to be held (Tr. 34, 35). Crawford states that he had arranged to meet Smith in front of the Coast Cable Company in Glenwood on the day of the oral auction, July 17, 1957, and that he and Smith went in Smith's car to Roseburg, where the oral auction was to be held (Tr. 35).

Since no other bids had been submitted, Vancouver Plywood on the one hand, and Crawford and Cameron on the other hand, were the only parties who could bid at the oral auction. 43 C.F.R. § 115.45. Sometime shortly before the day of the oral auction Crawford had agreed with Cameron that they would agree to withdraw their bid if they could secure Vancouver Plywood's contract to let them log the timber (Tr. 40). Therefore, on his way to the sale on July 17th, Crawford told Smith that if he and Cameron got the logging job, they would withdraw their bid (Tr. 37). Crawford states that Smith said that that was agreeable with him and that they could have the logging job (Tr. 37). Accordingly, Crawford states that he and Smith went directly to the sale, and after Smith made a bid of a nickel over the appraised price, Crawford withdrew his bid and the sale was awarded to Vancouver Plywood (Tr. 39).

Cameron was not present during the oral auction, but when Smith and Crawford left the Bureau of Land Management building, Cameron was outside (Tr. 39).

Crawford, Cameron and Smith then talked outside the BLM office, and Crawford and Cameron testified that during this conversation Smith stated that logging operations would begin in about 30 days (Tr. 40, 64). The contract price was confirmed and certain details of the logging operation were discussed (Tr. 64, 65). Crawford states that at this point Smith said, "Absolutely, you got the logging job when we get ready to log it." (Tr. 40).

About a week or ten days later, according to Craw-

ford (Tr. 43) and Cameron (Tr. 68), Cameron learned that another logger was logging the timber in question. After confirming the truth of this, and after complaining to a Mr. Plummer, who was in charge of log buying for Vancouver Plywood (Tr. 43, 44, 70), they learned that the logging contract had been given to a Mr. Nygaard (Tr. 45, 71). Thereafter, Cameron called Crawford to ask if he should go to a lawyer and Crawford consented (Tr. 45). This litigation resulted.

As the deposition of William Smith makes clear, the appellee denies the truth of most of appellants' testimony regarding any alleged agreement, but for purposes of the motion for summary judgment, appellee contends that if the material statements in appellants' depositions are accepted as true, the appellee is nevertheless entitled to judgment as a matter of law. Accordingly, the foregoing statement of "facts," is a statement of the "facts" as they appear from the sworn testimony of the appellants.

The depositions in this case show that all negotiations leading up to and including the alleged contract between Vancouver Plywood and the appellants, were between appellant Jack Crawford and William Smith, an employee of the appellee. Concerning these negotiations and the alleged agreement, it is apparent that appellant Cameron knew only what he was told by Crawford, and that in fact, Cameron did not meet Smith until after the alleged agreement had been made on the 17th of July (Tr. *passim*).

ARGUMENT

I

Appellants seek damages for breach of an alleged agreement wherein they agreed to refrain from bidding at an oral auction of government-owned timber in return for a promise by one of appellee's employees that they would be permitted to log the timber. The court below properly held that such an agreement tends to restrain or "chill" the bidding at an auction of public property, and is contrary to public policy and unenforceable.

A. It is the well-established law of Oregon that agreements which have a tendency to restrain competition in bidding at an auction of public property are unenforceable.

Appellants Crawford and Cameron, and appellee Vancouver Plywood Co. were the only parties qualified to bid at an oral auction of government-owned timber. Appellants seek damages for breach of an alleged agreement whereunder they would log this timber for Vancouver Plywood. The depositions on file in this case and abstracted in the Transcript of Record show that all negotiations between appellants and appellee up to and including the alleged oral agreement were conducted by appellant Jack Crawford and William Smith, an employee of Vancouver Plywood. Appellant Cameron had no contact with Smith until after the alleged agreement was made. Accordingly, it is the testimony of Jack Crawford which is the foundation of the motion for summary judgment. Mindful of the requirement that there be no issue of material fact, appellee has con-

ceded, for purposes of the motion, the truth of Crawford's testimony.

Crawford's own version of the alleged agreement is that he agreed to refrain from bidding at the oral auction in return for Smith's promise that he and Cameron would be permitted to log the timber at a specified price (Tr. 37). Since appellants and appellee were the only qualified bidders at the oral auction, the alleged agreement of appellants to refrain from bidding eliminated all competition at the sale, and permitted appellee to purchase the timber at the lowest price possible. A bargain which thus eliminates competition or "chills" the bidding at an auction of public property is almost universally held to be contrary to public policy and unenforceable as a matter of law. 5 *Williston on Contracts*, § 1663 (Rev. Ed.).

The applicability of the rule to the present facts is made clear by Williston's statement of the rule:

"... Bargains directly tending to chill competition, such as one that the successful bidder shall pay a percentage to his competitors, or employ a possible competitor to perform the contract at a pre-agreed price, constitute illegal stifling of competition." 5 *Williston*, supra, § 1663, p. 4692.

The public policy of Oregon on this issue has been established by a series of decisions of the Supreme Court of Oregon beginning as early as 1895. *Kine v. Turner*, 27 Or. 356, 47 Pac. 664 (1895), established the Oregon rule that a party to an agreement not to bid at a public auction of government property cannot enforce rights acquired thereunder, even if the agreement was

made in the utmost good faith and for the mutual benefit of the parties.

In the *Kine* case, an act of Congress provided that certain surplus lands should be sold at public auction. The plaintiff agreed to refrain from bidding at the auction in return for defendant's promise to convey a portion of the land to plaintiff at the same price per acre as defendant might be required to pay for the whole tract. Plaintiff refrained from bidding at the sale and defendant purchased the lands at the appraised price, the lowest possible. The Supreme Court of Oregon affirmed the trial court's decision refusing to enforce defendant's promise to convey a portion of the land to plaintiff. The court held:

" . . . The agreement between plaintiff and Switzler, whether it was for the conveyance of the land in dispute, as claimed by plaintiff, or for a twenty years' lease, as claimed by Switzler, was probably entered into at the time by both parties in good faith, for their supposed mutual benefit, and with no intention on the part of either to defraud the other. But this is not enough. The real question is whether the contract is not illegal because it contemplated a fraud upon the government of the United States, by stifling competition, thereby enabling Switzler to purchase at a price less than the land would otherwise have sold for. If so, it was void as against public policy, and plaintiff cannot recover in this suit, whatever may have been the motives of the parties, and however upright their intentions may have been, as between themselves. . . ." 27 Or. 26 359.

The Court in *Kine v. Turner*, supra, went on to find, as an additional ground for refusing to enforce the illegal bargain, that the federal statute under which the

land was sold, “. . . provides that surplus reservation lands shall be sold at public auction, the evident policy of the government being to obtain the highest and best price therefor at an open public sale, fairly conducted, and any contract or agreement between intending purchasers tending to prevent competition at such sale is necessarily in violation of the spirit of the law under which it was made, and in fraud thereof.” 27 Or. at 360.

The Court continued to state:

“ . . . It is important that sales at public auction should be conducted in good faith, without prejudice to the rights of any party, and for that purpose the law encourages bidding, and will not recognize as valid any contract or combination to prevent competition at such sales: [Citations]

“ ‘A sale at auction is a sale to the best bidder,’ says Henderson, C.J., ‘Its object a fair price, its means competition. Any agreement, therefore, to stifle competition is a fraud upon the principles on which the sale is founded. It not only vitiates the contract between the parties, so that they can claim nothing from each other, but also any purchase made under it, their claims against each other, but also any purchase made under it, their claims against the vendor being weaker than those against each other, policy alone forbidding that the last mentioned should be enforced, but both policy and justice united to condemn the former. If this be the rule with regard to auctions instituted by private individuals, a *fortiori* should it be as to those public auctions instituted by law for great public purposes’: *Smith v. Greenlee*, 2 Dev. 126 (18 Am. Dec. 564).” *Kine v. Turner*, *supra*, 27 Or. at 360, 361.

The agreement alleged by plaintiffs in the present case comes directly within the principles announced in

Kine v. Turner, supra. According to Crawford, he and Cameron got together before the sale and agreed that they would agree with Smith to refrain from bidding at the oral auction if Smith would agree to let them log the timber at a specified price (Tr. 40, 37). Crawford states that he then made just such an agreement with Smith while riding to the sale in Smith's car (Tr. 37). As a result, Smith purchased the timber without competition at the oral auction required by federal regulations, and necessarily obtained the timber for a lower price than if he had been forced to compete with another bidder. The purpose of the alleged agreement is clear: by eliminating competition, Vancouver Plywood is assured of obtaining the timber from the United States at the minimum price, and shares the spoils of this benefit with plaintiffs by letting them log the timber at a specified price.

The agreement alleged by plaintiffs in the case at bar would have as great a tendency to eliminate competition as the illegal bargain condemned by the court in *Rosenkrantz v. Barde*, 107 Or. 338, 214 Pac. 893 (1923). In the *Barde* case, the United States had seized and condemned a cargo of arms and ammunition carried by a vessel violating the neutrality laws, and had advertised the cargo for sale at public auction. Plaintiffs and defendant were members of a group formed for the purpose of bidding as a unit at the sale. In the course of the bidding, a third party named Kirk and defendant Barde had a whispered conversation, and when Kirk made the next bid, Barde stopped bidding. When plaintiffs consulted with Barde, he replied, "We are

protected." The property was "knocked-down" to Kirk. When Kirk and Barde later sold at a profit, plaintiffs instituted a suit against Barde to recover a share of the profits.

Although there were several other issues in the case, the court pointed out that:

"The case is argued largely in the briefs for and against the theory advanced by the defendant that the testimony shows an unlawful combination of the parties for the purpose of chilling the bidding at the sale and preventing the property from bringing an adequate price. The trial judge adopted this theory and dismissed the suit." 107 Or. at 346.

The court conceded the proposition that it was possible for several parties to pool their resources and bid as a unit without preventing competition, if their purpose was to make a stronger bid, but held that the effect of the agreement under consideration was to stifle competition.

"It is plain that in the instant case, the plaintiffs were not trying to encourage bidding or to increase competition so as to make the property bring a higher price. On the contrary, they were engaged in absorbing all opposition that appeared at all formidable. They drew the inference from the conduct of Barde and Kirk that the two of them had agreed to stifle bidding and allow the property to go to Kirk when Barde stopped bidding, as a result of the whispered conversation between them. Now, the plaintiffs seek the benefit of that unlawful compact when, in fact, they stood by, consenting to it." 107 Or at 347.

After rejecting various theories advanced by plaintiffs, the Court stated:

“ . . . The whispered transaction between Barde and Kirk, upon which the plaintiffs rely, plainly had the effect of stopping the bidding at a ridiculously low price for the property sold. As stated, we have here, only testimony on behalf of the plaintiffs. There was none offered for the defendant and it is said that he was not present at the trial. In *Jackson v. Baker*, 48 Or. 155 (85 Pac. 512), Mr. Chief Justice Bean, delivering the opinion wrote thus:

“ ‘If the illegality appear from the complaint or the plaintiff’s case, the court will, at any stage of the proceedings, dismiss the action, although such illegality is not pleaded as a defense, or insisted upon by the parties, and may have been expressly waived by them. It is an objection which the court itself is bound to raise in the due administration of justice, regardless of the wishes of the parties.’

“There are numerous authorities cited in support of this doctrine and it is the well settled rule in this state. . . .” *Rosenkrantz v. Barde*, supra, 107 Or. at 353.

The court concluded that the executory contract relied upon by plaintiffs was contrary to public policy and void, and accordingly the court affirmed the decree for the defendants.

The federal regulations (43 C.F.R. § 115.45) applicable to the sale of the timber involved in the present case, clearly contemplate open competition between the qualified bidders at the oral auction with an eye to obtaining the best possible price from a qualified bidder. The proposition that contracts are unenforceable which have the effect of “chilling” the competition contemplated by law was raised by the court on its own motion in the case of *Newport Construction Co. v. Porter*, 118 Or. 127, 246 Pac. 211 (1926). In the *Newport* case,

Newport agreed with Porter that Porter should bid on a road-surfacing contract and that Newport would surface the road for a price 10% less than the bid. When Porter refused to permit Newport to perform the road-surfacing, Newport sued Porter. The Supreme Court of Oregon reversed a decree for plaintiff and ordered the suit dismissed. The court stated, *inter alia*:

"It is not a case where two or more persons openly combined as joint adventurers to bid for the performance of public work. On the contrary, it is an instance where two concerns agreed in effect that one shall bid and that the work shall be performed actually by the other at 10 per cent less than the contract price. The conduct of the parties, as described in the complaint, amounts to what is called 'chilling the bids.' That it is contrary to public policy and hence void thus to act is decided in *Rosenkrantz v. Barde*, 107 Or. 338 (214 Pac. 893), and that any scheme which has the effect of depriving the public of the protection embodied in a statute requiring contracts to be let to the lowest responsible bidder is void is taught in *Montague-O'Reilly v. Town of Milwaukie*, 101 Or. 478 (193 Pac. 824, 199 Pac. 605). . . ." 118 Or. at 134, 135.

The court then went on to state that although the issue of illegality had not been raised in the briefs, that where the illegality appears from the plaintiff's case, the court is constrained to raise the point itself. *Newport Construction Co. v. Porter*, *supra*, 118 Or. at 135.

See also: *Terwilliger Land Co. v. City of Portland*, 62 Or. 101 (1912) in which it is stated that, "It is a well-settled general rule that all contracts in which the public are interested, which tend to prevent the competition required by statute, are void. (Citations)." 62 Or.

at 106. Dictum in *Pyle v. Kernan*, 148 Or. 666, 36 P.(2d) 580 (1934) restates the principle that any contract having a natural tendency to stifle competition for public work is contrary to public policy, and that the test is the evil *tendency* of the contract and not its actual injury to the public in a particular instance. 148 Or. at 673, 674. Also see: *Reinstine v. Rosenfield*, 111 F.(2d) 892, 895 (7th Cir. 1940) (Where 7th Circuit specifically approved the reasoning of the court in *Kine v. Turner*, 27 Or. 356, supra, and the cases there cited.)

B. Because plaintiffs and defendant were the only qualified bidders at the oral auction, any bargain whereunder plaintiffs agree to withdraw from the bidding for a consideration, contravenes the established competitive bidding policy of the O. & C. statutes and regulations and is illegal and unenforceable.

- (1) *The purpose of the policy of competitive bidding established in the O. & C. statutes and administrative rulings will be frustrated if agreements such as the agreement asserted by appellants are enforced.*

The alleged agreement in the present case is contrary to the provisions of the basic act of June 9, 1916 (39 Stat. 218) which provided that O. & C. timber lands "shall be sold for cash . . . at such times, in such quantities, and under such plan of competitive bidding as in the judgment of the Secretary of Interior may produce the best results, . . ." The regulations of the Commissioner of the General Land Office, and later of the Bureau of Land Management, have always followed the statutory directive for competitive bidding in public sales of O. & C. timber. The policy is continued under the present regulations. 43 C.F.R. § 115.36 *et seq.*

The purpose of the statutory and administrative policy is obvious. Only through fair and open competition may the government consistently obtain the actual market value of the timber it offers for sale. Figures released in the Report of Investigation of the Sale of Government-Owned Timber of the Forest Service, Department of Agriculture, and the Bureau of Land Management, Department of Interior, which was submitted to the Comptroller General by the General Accounting Office on March 31, 1953, show that appraisal does not secure the actual market value. On page 51 of the above report, the following statistics are set forth respecting oral auctions of timber conducted by the Bureau of Land Management:

Year	Appraised Value	Bid Price	Percentage Over Appraised Value Obtained By Com- petitive Bidding
1948	\$ 33,163	\$ 73,333	121.1%
1949	312,219	587,583	88.2%
1950	1,752,730	2,973,951	69.7%
1951	3,293,023	4,737,156	43.9%
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	\$5,391,135	\$8,372,023	55.3%

The above figures attest to the importance of competitive bidding to the government, and justify the reasoning underlying the established public policy. Absent competition, almost \$3 million, more than 55% of the appraised value in the period covered, would have been lost.

Sanction of agreements such as the agreement Crawford swore that he made with Smith would open the door to similar agreements and the countless variations there-

of. The plain duty of this court is to uphold the established public policy that keeps this door shut.

- (2) *Courts of other jurisdictions have been quick to refuse to enforce contracts such as the alleged agreement here where the elimination of one bidder eliminated all competition.*

The case of *Kuhn v. Buhl*, 251 Pa. 348, 96 A. 977 (1916), involves a factual situation which is analogous to the present situation in that the alleged bargain eliminated all competition. The *Kuhn* case involved the reclamation of desert lands in Idaho under a regulatory system established by act of Congress and complementary Idaho statutes. The regulatory scheme provided the procedure by which individuals might obtain contracts from the land commissioners to construct reclamation projects. The individuals desiring a contract were to submit specific and detailed proposals to the land commissioners. Plaintiff and defendant each submitted proposals which were different in many respects, but involved the same area. The granting of one proposal would have necessarily required the refusal of the other, and accordingly the two proposals were competitive. While the proposals were pending, the plaintiff and defendant orally agreed that plaintiff would withdraw his bid and that defendant would purchase plaintiff's maps, plans, surveys and estimates for a specified sum.

When the plaintiff withdrew his bid according to the agreement, the defendant refused to purchase the surveys, maps, and estimates, plaintiff sued for damages.

The Supreme Court of Pennsylvania affirmed a judgment for the defendant on the ground that the contract was against public policy and unenforceable. The court stated:

“The law is established that, where any public right, franchise, contract, or privilege is to be disposed of by government officials or agents, whether by a public letting or awarding upon bids, or by the exercise of official discretion without public bids [Citations], it is against public policy for one competing applicant, candidate, or bidder to contract for the extinguishment of another’s competition [Citations].” *Kuhn v. Buhl*, supra, 96 Atl. at 983.

In the case of *Heid Bros. v. Riesto*, 281 S.W. 638 (Civ. App. Tex. 1926), the plaintiff and defendant were rival bidders for a government contract for wood. An agreement was reached whereunder plaintiff agreed not to bid on the contract, and defendant agreed to purchase 12,000 cords of wood from plaintiff at \$6.00 per cord. Plaintiff did not bid, and the contract was awarded to defendant. However, defendant refused to purchase the 12,000 cords from plaintiff. When plaintiff sued for damages, the court reversed a judgment for the plaintiff and rendered judgment for the defendant.

The court found two grounds for its decision: That the contract was contrary to public policy, and that it was also violative of the anti-trust laws. The court stated that it was unable to find any other case that had held that such a contract violated the anti-trust laws, but it had no difficulty finding authority for the proposition that the contract was illegal on grounds of public policy. Among other authorities, the court quoted

with approval the following passage from 13 Corpus Juris p. 436:

“ ‘Agreements not to compete with another in making bids, to withdraw a public or quasi public contract, to share in the result or profits, or other agreements having a direct tendency to prevent bidding or competition, are against public policy.’ ”
281 S.W. at 639.

See also: *Swan v. Chorpenning*, 20 Calif. 182 (1862) (Contract to withdraw bid for mail carriage contract and to assist defendant in getting a contract over a longer route including the original route bid, held void and illegal).

C. The alleged agreement that appellants would refrain from bidding at an oral auction of government owned timber if appellee would let them log the timber does not come within any of the recognized exceptions to the rules declaring such bargains to be illegal and void; especially where appellants and appellee were the only parties permitted to bid at the auction.

(1) *This is not a case where two parties pool their resources to bid where neither of them could bid alone; both appellants and appellee had submitted an independent bid, and both were interested in obtaining the entire property. Accordingly, the cases cited by appellant are not in point.*

The only Oregon decision cited by appellant is *Pyle v. Kernan*, 148 Or. 666, 36 P.(2d) 580. The agreement in the *Pyle* case in no way had the effect of stifling competition, and accordingly is not in point. In *Pyle v. Kernan*, supra, plaintiffs had submitted the low bid to the State Highway Commission for the resurfacing of twelve miles of highway. Defendant's bid was some

nine thousand dollars higher. After plaintiff had expended three thousand dollars on preliminary work, it was discovered that the type of rock specified in the contract could not be crushed except at excessive cost. The Commission conducted extensive negotiations with both the plaintiff and the defendant, and finally it was agreed that a different type of rock would be used, that plaintiff would assign the contract to the defendant, and that defendant would reimburse plaintiff for the expenditures to that point. Defendant finished the work and was paid, but refused to reimburse the plaintiffs. The Supreme Court affirmed a three thousand dollar judgment for the plaintiffs and rejected the contention that the assignment was illegal. The court pointed out that the state had received full benefit of competitive bidding, that the bidding was free and open, and that the contract had no effect on competition.

All of the other cases cited by appellant in which agreements to refrain from bidding at a public sale were not condemned as contrary to public policy were decided by state courts outside of Oregon. In each of these cases, the public policy reason for preserving competition was not present.

One recognized exception to the rule is where each of two or more parties are interested in a specific portion of the property and agree to pool their resources to make a single bid where none could bid alone. This is the principle involved in *Henderson v. Henrie*, 61 W. Va. 183, 56 S.E. 369, cited by appellants (Appellants' Brief p. 7). A similar principle is involved in the ALR

annotation cited on p. 8 of appellants' brief. 45 ALR 551. The proposition there contained is that two or more public contractors may legally combine to bid on a job which none had the resources to undertake alone. In both of the above cases, the reason for the exception is that such agreements cannot have the effect of eliminating a bidder or depressing the sale price, but on the contrary would secure a bidder who, without the agreement, would not bid.

The appellant does not demonstrate the applicability of the above exception to the present facts. The deposition of appellant Crawford demonstrates its inapplicability. Both appellee and appellants had sufficient resources to make the original bid, and to purchase the sale alone. Crawford and Cameron appear to be confused as to the identity of the "interested party" who was to provide the necessary financing to make the \$98,000.00 purchase, but both are adamant in maintaining that they had the backing necessary (Tr. 29-31, 62-63). The appellee and appellant both entered their bids in good faith, and presumably both were able and intended to make a purchase independently of the other. If this is not true, the appellant's bid was a sham and entered solely for the purpose of discouraging other bidders, or of coercing appellee into letting appellants log the timber. Either purpose would be illegal.

- (2) *The "exception," holding that persons having a common economic interest in the property may legally agree to refrain from bidding at a public sale of the property, is applicable only to public sales of private property where the group to which the "exception" applies are those intended to be benefited by the rule, and not to sales of government property where the government alone is intended to be protected.*

The other exception to the rule which is contained in cases cited by appellants on pages 7 and 8 of appellants' brief is also not applicable under the present facts. These are the cases holding that agreements between creditors, stockholders, bondholders, lienholders, etc., to refrain from bidding at a public sale are not illegal when made to protect a common economic interest in the property being sold. This is the situation in the cases *Lay v. Brown*, 106 Ark. 1, 151 S.W. 1001 (1912); *Powers v. Ullman, Stern & Krausse Inc.* (Tex. 1929), 16 S.W. (2d) 910; and *Sturgis v. Wylie* (Ark. 1938), 120 S.W. (2d) 571, cited by appellants on page 7 of their brief.

These cases all involved the public sale of private property, as distinguished from the public sale of public property. The contracting parties had an interest in the property being sold. The public policy in favor of free competitive bidding at sales of private property is designed to protect private persons who have an interest in seeing the property bring its highest price by compelling competition among the general public. The rule is relaxed, not in favor of all members of the general public, but in favor of some persons having an interest

in the property before the sale and who are members of the class which the rule was designed to protect. It is not merely the fact that one has some interest in the property to be sold which exempts him from the rule, but rather it is the fact that he is one of those whom the rule is intended to benefit. Therefore, in effect, he is permitted to waive the benefits of the rule if by doing so he can better protect his own interests.

However, a different purpose is embodied in the rule which prohibits stifling of competitive bidding at sales of government property. The policy here is not to protect the interests of private persons. The government alone is intended to be protected by the policy which demands competitive bidding, and declares illegal contracts which have the effect of stifling competition.

Appellants' brief suggests that they entered a bid to protect some economic interest in the timber here involved and that the public policy condemning agreements which have the effect of "chilling the bidding" on sales of government property should be relaxed in their favor. Appellant Crawford makes clear that he knew Vancouver Plywood had already submitted a bid with the appropriate deposit before he and Cameron submitted their bid (Tr. 26, 32, 34). The submission of a bid by Crawford and Cameron had the effect of avoiding the awarding of the sale to Vancouver Plywood at the appraised price, and threw the sale over to an oral auction at which only appellants and appellee could bid. 43 C.F.R. § 115.45. What economic interest Crawford thought he had in the timber prior to the auction is

not clear, but it is clear that appellants had no more legal interest in this O. & C. timber than did any other member of the public except that they were one of the only two qualified bidders. The public policy against agreements to refrain from bidding at public sales of government owned property, as opposed to privately owned property, was intended to protect the government *against* the interests of appellants, not to protect appellants' interests at the expense of the government.

II

The complaint and the deposition of appellant Crawford show clearly that the alleged agreement upon which appellants seek to recover is illegal and unenforceable; accordingly, there is no genuine issue of material fact, and the court below correctly decided that appellee was entitled to summary judgment as a matter of law.

A. When appellant Crawford's own deposition shows that the alleged agreement upon which the appellants rely is illegal, summary judgment is a proper remedy for appellee.

The depositions of Crawford, Cameron and Smith (Tr. 18-101) make it clear that all negotiations up to and including the alleged agreement were between Crawford and Smith. Cameron had no contract at all with Smith until after the sale and after the alleged agreement had been made. Accordingly, the deposition of Cameron is largely irrelevant surmise and hearsay, inadmissible in evidence, and it is the deposition of appellant Crawford which supplies the facts for purposes of the motion for summary judgment. Appellee

denies most of these "facts" in reality, but for purposes of the motion, and to demonstrate the absence of any genuine issue of fact, the appellee has conceded the facts as they appear from Crawford's own sworn testimony.

When the complainant's own showing in a contract action reveals that the action is illegal and unenforceable, summary judgment for the defendant should be granted. In the case of *Silverman v. Osborn Register Co.*, 155 F.(2d) 879 (U.S. App. D. C. 1946), the plaintiff sued for \$280,000.00 damages for an alleged breach of contract. After taking the plaintiff's deposition, the defendant moved for summary judgment on the ground that the plaintiff's own testimony showed that the alleged agreement was illegal and unenforceable, and that accordingly, there was no issue of material fact which would justify a verdict for the plaintiff. The trial court granted defendant's motion for summary judgment and the Court of Appeals affirmed.

It appeared from plaintiff's deposition that plaintiff desired to obtain a certain contract from a federal agency. Plaintiff alleged that he entered into a contract with the defendant whereunder defendant was to raise, by 15%, a bid previously quoted to the plaintiff, and then submit that bid directly to the agency involved, with plaintiff's assistance. When defendant obtained the contract and refused to pay plaintiff 15%, plaintiff sued.

The Court of Appeals stated:

"On these facts, all supplied by him, appellant asks us to hold that the trial court erred in finding, (a) that there was no real issue of fact, and that

therefore a Motion for Summary Judgment would lie; and (b) that the general principle laid down in *Providence Tool Co. v. Norris*, 2 Wall. 45, 54, 17 L.Ed. 868, is applicable. No real issue of fact appears, and we think the trial court correctly applied the underlying principle of the Tool Co. case, and quite rightly disposed of the litigation with a memorandum opinion pointing out:

“ ‘The tendency of such an agreement as we have here, apart from other consideration, was to have the government pay fifteen percent more than it would presumably have paid under the circumstances. Such a contract is illegal and void on the ground of public policy and as a consequence the courts have no alternative in such a situation but to so declare it. True, the defendant reaps the benefit, but the courts cannot be concerned with that aspect of such matters, for reasons that are obvious and have been expressed judicially time and again. They, therefore, leave the parties where they find them.’ ” *Silverman v. Osborne Register Co.*, supra, 155 F.(2d) at 880.

Another case in which the defendant's motion for summary judgment was based entirely upon the deposition of the opposing party was *Jeffress v. Weitzman*, 221 F.(2d) 542 (U.S. App. D. C., 1955)(where the court stated:

“ . . . As permitted by Rule 56 (b), Federal Rules Civ. Proc., 28 U.S.C.A., the court before ruling considered a deposition in which plaintiff fully set forth the factual basis for his claim of a promise as alleged. No other facts being advanced summary judgment for defendant was proper, for the deposition shows no factual issue which would have justified the court in refusing to direct a verdict for defendant; that is, as the Rule states, defendant was entitled to judgment as a matter of law. Rule 56 (b), supra; *Dewey v. Clark*, 86 U.S. App. D. C.,

137, 143, 18 F.(2d) 766, 772." *Jeffress v. Weitzman*, supra, 221 F.(2d) at 543.

For other cases where the showing of one party provided the basis for a summary judgment for the other party see:

American Airlines v. Ulen, 186 F.(2d) 529 (U.S. App. D. C. 1949) (Summary judgment granted plaintiff where defendants answers to interrogatories showed negligence.); *Hoffman v. Lamb Knit Goods Co.*, 37 F. Supp. 188, 190 (D. C. Mich. 1940) (Summary judgment for defendant granted on the basis of plaintiff's deposition which failed to show necessary relationship of master and servant.)

B. The verified complaint alleges that on or about July 17, 1957, appellants and appellee entered into an oral contract. Appellant Crawford's own sworn testimony is that on the 17th of July he agreed with Smith that if appellee would let appellants log the timber, appellants would refrain from bidding at the oral auction. Taking these facts in the light most favorable to the appellants, the court below correctly granted appellee's motion for summary judgment on the ground that the alleged contract was an illegal bargain tending to stifle competition at an oral auction of government timber.

It is fundamental that the party moving for summary judgment must demonstrate that there is no issue of fact which would justify a verdict for the opposing party. In this case, appellee moved for summary judgment because it appeared from appellant Crawford's own sworn testimony that the agreement forming the basis for the action was illegal and unenforceable be-

cause it was an agreement which tended to "chill" the bidding at an oral auction of government-owned timber.

Judge Solomon, in his memorandum opinion pointed out that ". . . the testimony of Jack Crawford as to what transpired just prior to the auction, even when viewed and interpreted most favorably to the plaintiffs in the light of all of Crawford's other testimony, clearly shows that it was a contract to chill bidding, and therefore illegal. . . ." (Tr. 12).

Appellants were entitled to have every reasonable and legitimate inference in the testimony of Crawford resolved in their favor. However, the limit of the Court's indulgence for the appellants should be *legitimate* and *reasonable* inferences. The requirement of the motion for summary judgment is that there be no "*genuine* issue as to any material fact." Rule 56 (c) Fed. Rules Civ. Proc.

Somehow, counsel for appellants finds in the testimony of Crawford that there was an agreement prior to the agreement of July 17th. Just where any testimony of Jack Crawford indicates the making of a contract prior to July 17th has eluded counsel for appellee, and accordingly, it is submitted that Crawford's testimony permits no such inference. The testimony of Cameron is irrelevant on this issue because Cameron did not even meet Smith until after the sale. Cameron depended upon Crawford for all his information, and the testimony of Crawford makes it clear that the only contract made was the one he made with Smith on the way to the oral auction where he agreed to withdraw his bid if Smith would give them the logging job.

Counsel for appellants cannot defeat summary judgment by merely stating a fanciful conclusion unsupported by the evidence where every other indication is to the contrary. As stated in a well documented passage in *Moore's Federal Practice*:

"And although the moving party may be unaided by any presumption, when he has clearly established certain facts the circumstances of the case may cast a duty to go forward with controverting facts upon the opposing party, so that his failure to discharge this duty will entitle the movant to summary judgment.

"To defeat the movant who has otherwise sustained his burden within the principles above, the party opposing the motion must present facts in proper form—conclusions of law will not suffice; and the opposing party's facts must be material and of a substantial nature, not fanciful, frivolous, gauzy, nor merely suspicions." 6 *Moore's Federal Practice*, pp. 2130, 2131 (Para. 56.15 (3)).

The facts, according to plaintiff's sworn testimony, are that on the 17th day of July, 1957, appellants and appellee entered into an agreement whereby appellant agreed to refrain from bidding at an oral auction of government timber in return for appellee's promise that appellants would be allowed to log the timber.

If the evidence in Crawford's deposition were presented upon trial, the court would have no recourse but to direct a verdict in favor of the appellee. The purpose of the summary judgment rule is to avoid needless delay and expense where there are no *real* issues of fact which could be presented to a jury. This court in *Byrnes v. Mutual Life Ins. Company of New York*, 217 F.(2d) 497 (9th Cir. 1954) pointed out the readiness of this

and other courts of appeal to grant summary judgment where the pleadings and affidavits show that there is no real issue as to any fact material to the determination, and stated one of the tests to be as follows:

“If the testimony presented by the affidavits is such that a directed verdict would have to be granted, the court is justified in granting summary judgment unless affirmative testimony is offered to discredit the testimony. The Court of Appeals for the Second Circuit has stated the principle in this manner:

“‘When a party presents evidence on which, taken by itself, it would be entitled to a directed verdict if believed, and which the opposite party does not discredit as dishonest, it rests upon that party at least to specify some opposing evidence which it can adduce and which will change the result. In this case the defendant should have specified some instances that it had reason at least to suspect would contradict Markert; the record against it was too specific to be met by mere hypothesis. Had the case gone to trial, it could not have asked the judge to tell the jury that, though Markert had testified honestly, they must reduce the recovery because he might have been mistaken about some of the factors. We cannot therefore see how a trial would add any certainty to the conclusion which is inevitable upon this record.’ *Radio City Music Hall Corporation v. United States*, 2 Cir., 1943, 135 F.2d 715, 718.

“This test has been adopted and applied by this court in *Gifford v. Travelers Protective Ass’n*, 9 Cir., 1946, 153 F.2d 209, 211. And see, *Hurd v. Sheffield Steel Corp.*, 8 Cir., 1950, 181 F.2d 269, 271. . . .” *Byrnes v. Mutual Life Ins. of New York*, 217 F.(2d) 497 at 501.

The appellants’ brief states that appellee will place much emphasis on the fact that the complaint alleges

that the oral contract upon which appellants rely was entered into on or about the 17th day of July, 1957. Appellant assumes correctly. This was a sworn complaint alleging that an *oral* contract was made on July 17th. Appellant Crawford in his sworn testimony states that on July 17th, he met Smith, appellee's employee, and that they drove to the oral auction in Smith's car (Tr. 36, 37). At this point, appellants and appellee were the only parties qualified to bid at the oral auction and one of them would have to purchase the timber. Even if neither bid, the qualifying bid of one of them would be accepted. 43 C.F.R. § 115.36 *et seq.* Regarding this conversation, Crawford testified as follows:

"Q. Just tell me what that discussion consisted of.

A. Well, I agreed that if Bob and I got the job of logging it, we would withdraw our bid.

Q. Well, just tell me who said what and what was said, if you will.

A. Well, I can't remember of too much being said other than that.

Q. You say you agreed that if you and Mr. Cameron got the logging job, you would withdraw your bid on the timber, is that correct?

A. Yes.

Q. And what did Mr. Smith say to that?

A. He said that would be all right.

Q. Do you say that he agreed that you would get the job?

A. Yes. (42)

Q. Then what, if anything else, was said?

A. That is a hard thing to answer. We talked about several things but it was small talk.

Q. Well, did you say anything more about this timber or the bidding on it or anything in connection with it?

A. No.

Q. Just what you have told me here now?

A. Yes.

Q. And just to be sure that we have it correctly and have all of it, you told Mr. Smith that if you and Mr. Cameron got the logging job, that you would withdraw your bid, and you say that he said that was agreeable, that you could have the job, is that correct?

A. Yes. I think there is one thing there I ought to correct. I think I said I submitted that bid on the 17th. It was a day or two before the 17th when that bid was put in." (Tr. 37, 38).

It would be difficult to make it any clearer that Crawford, on July 17th, agreed to withdraw his bid if Smith would agree to give him the logging job. Crawford's testimony is that he and Cameron had agreed in advance that such an agreement should be made (Tr. 39, 40). The sworn complaint alleges that an oral contract was entered into on this day, July 17th. Nevertheless, counsel for appellants suggests that the reason the date July 17th was used was because that was the date the contingency of some earlier contract occurred "thus bringing the contract into *existence*." Appellants' brief p. 18 (emphasis added). Counsel for appellants makes it clear that he knows when a contract comes into "existence" when he hastens to assume "for purposes of argument" that they were in error in concluding that the contract was not in existence prior to the 17th, and suggests that an error in *dating* does not provide grounds for summary judgment. It is submitted that the complaint and Crawford's testimony make it obvious that no error in *dating* occurred, but that the contract relied upon was the illegal agreement of July 17th.

The distorted version of the clear words of plaintiff's testimony goes beyond the bounds of resolving ambiguities in favor of the plaintiff, and enters the realm of the fanciful and frivolous. The complaint and the testimony make it abundantly clear that it is Crawford's sworn position that on July 17, 1957, he agreed to refrain from bidding at the oral auction in return for Smith's promise that Crawford and Cameron would get the logging job.

Cameron and Crawford's agreement prior to July 17th that they would agree to withdraw their bid if Smith would agree to let them log the timber is inconsistent with the suggestion that appellants had a contract with appellee. If they had a contract, there would be no occasion for them to agree as to what they would do if they got the contract. Appellants and appellee were the only parties qualified to bid at the auction, and both had submitted a binding bid so that it was impossible for *both* to withdraw. It was assured that either Vancouver Plywood or appellants would get the timber. Even if neither bid at the oral auction, one would be required to make good on his qualifying bid.

In view of the fact that before he submitted his and Cameron's bid, Crawford knew that Vancouver Plywood had already submitted a bid (Tr. 32, 33, 34, 42), the very fact that the appellants submitted a bid at all is inconsistent with the suggestion that there was a contract between the parties prior to July 17th. On the contrary, it suggests that appellants intended to use their bid as a lever to coerce the appellee into giving them the logging contract. The latter is an inference

which may doubtless be resolved in favor of appellants; however, it requires no inference to understand the statement, "I agreed that if Bob and I got the job of logging it, we would withdraw our bid." (Tr. 37).

The summary judgment procedure prescribed in Rule 56 is designed to eliminate the time and expense, for parties and the courts, of an unnecessary and needless trial. The law does not permit enforcement of a contract such as the one the appellant swears he entered into with the appellee's employee. *Kine v. Turner*, 27 Or. 356, 359; *Newport Construction Co. v. Porter*, 118 Or. 127, 134 (1926). And where the evidence presented in support of a motion for summary judgment would entitle the defendant to a directed verdict, it rests upon the plaintiff to produce evidence which would change the result. *Gifford v. Travelers Protective Ass'n.*, 153 F.(2d) 209, 211 (9th Cir. 1946); *Byrnes v. Mutual Life Ins. Company of New York*, 217 F.(2d) 497 (9th Cir. 1954).

The appellants had more than ample time between the filing of the motion for summary judgment and the entry of the order granting that motion to submit affidavits regarding the existence of some other contract than the one of July 17th apparent in Crawford's testimony. The trial judge had indicated that the motion would be granted at an oral hearing long before the final briefs were submitted and judgment entered.

This court made clear that there is a difference between a "genuine" issue of fact and a mere pretended issue in *Suckow Borox Mines Consol. v. Borax Consol.*,

185 F.(2d) 196, 205 (9th Cir. 1950). There a defendant had disproved necessary allegations in the complaint, but the basic principle of the court's statement is applicable to the present situation in that: "The whole purpose of the summary judgment rule is to separate real and genuine issues from mere formal or pretended issues." *Suckow* case, *supra*, 185 F.(2d) at 205.

Appellants' brief concludes that "An effort to assure that there would be at least one bidder at the sale should not be twisted into an illegal scheme to 'chill the bidding.'" Appellants' brief p. 19. When it is remembered that Crawford knew Smith had submitted a bid with the appropriate deposit (Tr. 31, 32, 33, 42), and that the submission of a bid would result in a sale to the bidder unless another bid were made, and that the qualifying bids were binding (43 C.F.R. § 115.36 *et seq.*), the above suggestion is patently absurd. The appellants' position calls to mind Lord Kenyon's famous statement quoted in the leading case on illegality, *McMullen v. Hoffman*, 174 U.S. 639, 43 L.Ed. 1117 (1889), that the plaintiff will not be permitted to say:

"... suffer us to garble the case, to suppress such parts of the transaction as we please, and to impose that mutilated state of it on the court as the true and genuine transaction, and then we can disclose such a case as will enable our clients to recover in a court of law.'" 174 U.S. at 656, 43 L. Ed. at 1124.

CONCLUSION

The appellants have filed a sworn complaint alleging that on or about the 17th day of July, 1957, appellants and appellee entered into an oral contract to log timber. Appellant Crawford has sworn that on the 17th day of July he agreed with appellee's employee Smith that if appellants got the logging job, they would withdraw their bid. Appellants and appellee were the only parties qualified to bid at the oral auction. The federal statutes and regulations, the decisions of the Oregon courts, and the decisions of the courts of other jurisdictions make it clear that contracts which tend to stifle competition in bidding for public property are illegal and void.

It is clear that the agreement testified to by Crawford was not an open and joint effort at combination by two parties who could not otherwise bid. Both had submitted a bid and both were prepared to bid at the oral auction until the illegal agreement eliminated appellee's only competitor.

Appellant Crawford's own clear testimony establishes that the contract referred to in the complaint was an illegal bargain to restrain or eliminate competition at an auction of government-owned timber.

In view of the clear state of the federal and state law condemning such contracts as unenforceable, no useful purpose would be served by committing the courts and the parties to an unnecessary trial.

Appellee respectfully prays that the judgment of the

District Court of Oregon granting appellee's motion for summary judgment be affirmed.

Respectfully submitted,

BLACK, KENDALL & TREMAINE and
MILTON C. LANKTON,
Attorneys for Appellee.



No. 16037 ✓

United States
Court of Appeals
for the Ninth Circuit

T. F. KORHERR,

Appellant,

vs.

A. J. BUMB, Trustee in Bankruptcy of Mallard
Pond Builders, Inc., Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

JUL - 8 1958

PAUL P. O'BRIEN, CLERK

No. 16037

United States
Court of Appeals
for the Ninth Circuit

T. F. KORHERR,

Appellant,

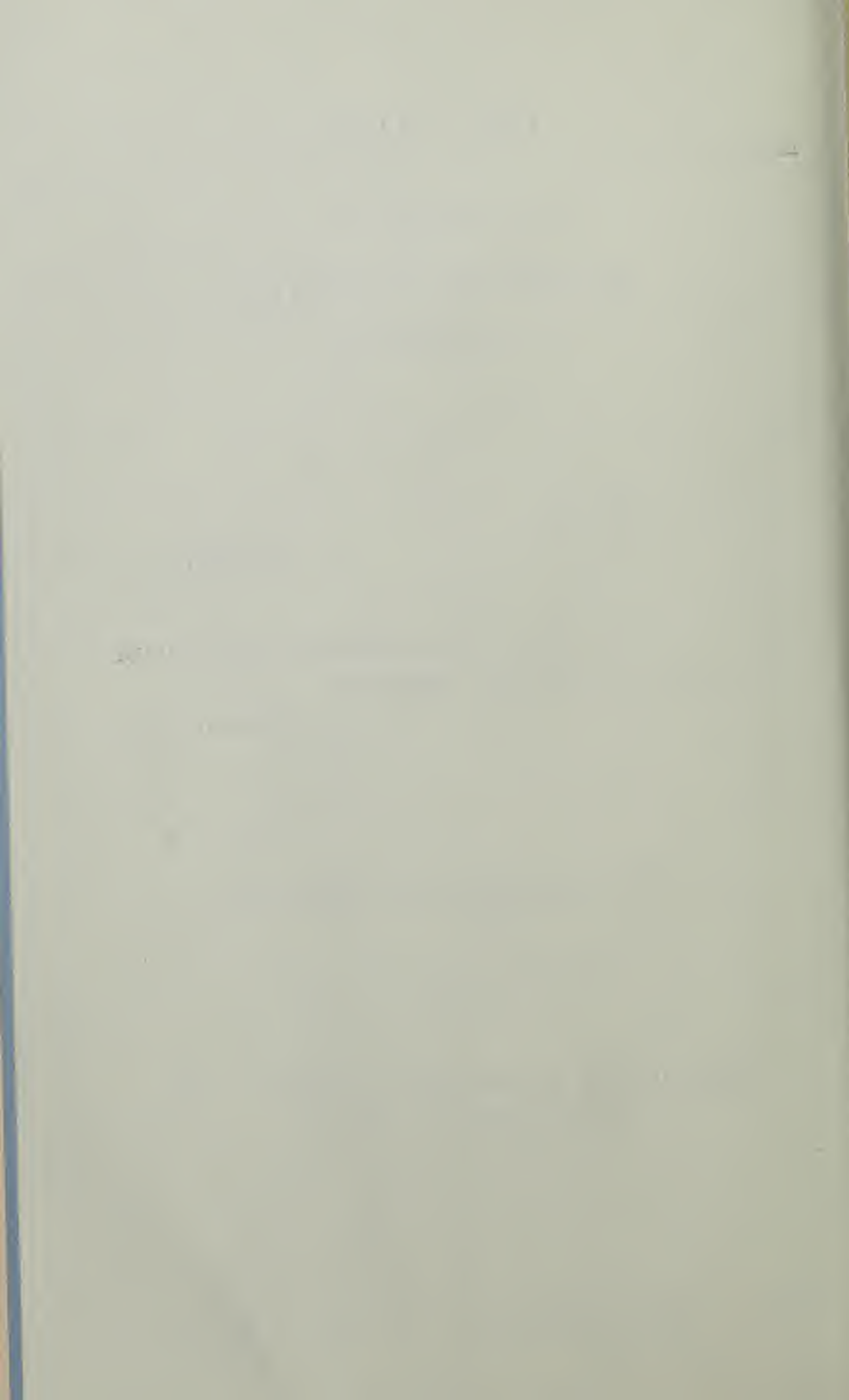
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court, Southern
District of California, Central Division

In Bankruptcy No. 76443-PH

In the Matter of:

MALLARD POND BUILDERS, INC., a Corpora-
tion,

Bankrupt.

REFEREE'S DECISION

To: William J. Tiernan and Tony Geram, attorneys
for the Trustee. Edgar C. Keller, attorney for
Hansen Sargent Lumber Company, and T. F.
Korherr.

On April 24, 1957, the Trustee, filed his Petition
for Order to Show Cause re: Sale free and clear of
liens and the Order thereon was duly issued under
date of April 24, 1957, directed to various lien
claimants, including Hansen Sargent Lumber Com-
pany and T. F. Korherr. Thereafter, on the 25th
day of April, 1957, the said Hansen Sargent Lumber
Company and T. F. Korherr filed their answer to
the foregoing Petition. That on the 25th day of
April, 1957, a Stipulation was entered into by the
respective parties to the effect that the parties
agreed to submit the matter upon a Stipulation of
Facts in writing to the Court. That, thereafter, it
was verbally agreed by the parties that in lieu of an
agreed "Stipulation of Facts" in writing the re-
spective parties would set forth the facts in their
various memoranda to be subsequently filed. That,

while, the said facts as set forth in the memoranda of Points and Authorities did not completely cover all of the facts, the Court has sufficient knowledge, gathered from the various memoranda, so submitted, to make its decision. [2*]

Therefore, in absence of any further Stipulated facts, the Court decides the matter as follows:

As to Hansen Sargent Lumber Company, the Court has no doubt that the said lumber company was a materialman as to the materials furnished to the owner of 33 houses; that while there may be some question that said lumber company took the necessary steps to protect and preserve their lien rights, within the time provided for by the mechanic lien law of the State of California, as to most of the houses, they did, however, follow the alternative procedure provided by the mechanic lien law, to wit: Section 1190.1 (h) C. C. P., to wit: by "Stop Notice." The "Stop Notice" was duly served within the time, and the appropriate bond, per said Section 1190.1 (h) was given at which time there were ample funds in the possession of the lending company, to more than cover the lumber company claim. Thereafter, the lumber company filed an action, within the time provided, for the foreclosure, on both their mechanics lien notice, and on their stop notice, being San Bernardino Municipal Court action No. 12564.

Therefore, as to the Hansen Sargent Lumber Company, it is my opinion that the lien is good, as a

*Page numbering appearing at foot of page of original Certified Transcript of Record.

statutory lien against the funds in the hands of the trustee for the full amount of the balance of their claim of \$2,547.62 plus \$2.80 cost of filing lien notice, plus \$19.55 court cost incurred in their action.

As to T. F. Korherr, he served a "Stop Notice" on "Perpetual" on November 6, 1956. It is my conclusion that Korherr was a contractor within the meaning of Section 1190.1 (h) C. C. P., and, therefore, could not avail himself of the "Stop Notice" to protect his lien rights. His written contract for the floor work was directly with the owner Mallard Pond Builders, Inc. (see Exhibit "I" trustee's memorandum of points and authorities). However, on October 10, 1956, Korherr recorded seven notices of mechanics liens on lots 8, 9, 20, 23, 65, 7 and 21, all within the 60 day period allowed a contractor. No notice of completion was ever recorded as to lots 8, 7 and 21. [3]

Later, and within the 90 day period allowed for filing action to foreclose, Korherr filed his action "case 13010 Municipal Court San Bernardino." Whether or not lis pendens of Korherr's action or of the Hansen Sargent Lumber Company was filed in the recorder's office, as now provided by the mechanics' lien law, I do not know, but for the purpose of these proceedings must assume that such jurisdictional steps were duly taken.

If Korherr did take such necessary steps to protect his mechanics' lien, I believe that his statutory lien is good, and can be enforced, after bankruptcy,

provided for under Section 67b of the Act, as to the foregoing lots 8, 20, 23, 65, 7, 21 and 9.

Further computation shows that the amounts still due and to be paid through lending agency was as follows:

Lot 8	\$ 416.50
Lot 20	416.50
Lot 23	416.50
Lot 65	416.50
Lot 6	381.00
Lot 21	381.00
Lot 9	81.00
<hr/>	
Total	\$2,509.00

I believe, that due to the fact, that Korherr took all of the necessary steps to effect his liens, as to the above lots, independent of his alternative attempt under the Stop Notice that he has a good statutory lien in the foregoing amount of \$2,509.00.

I am not deciding, however, that in the event other lien claimants who assert their liens and have complied with Section 1194.1 by segregating the amounts claimed against each lot, should not be preferred, as against both Hansen Sargent Lumber Company and T. F. Korherr, who have not complied with said section.

Neither am I deciding as to the priority under Section 64 of the Bankruptcy Act.

Will you, therefore, the respective attorneys for the trustee, and for the above creditors, consider the thoughts and conclusions arrived at herein, and if you agree, as to my conclusions, prepare, file and [4] serve Findings, Conclusions and Order to conform therewith.

On the other hand, if the parties do not agree as to my Findings of Fact, and desire further evidence concerning the facts, will you please so indicate, otherwise, my conclusions are as above indicated.

Dated at San Bernardino, California, October 1, 1957.

/s/ OLIVER M. CHARLEVILLE,
Referee in Bankruptcy.

[Endorsed]: Filed November 1, 1957. [5]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO STOP NOTICES

On April 24, 1957, the Trustee filed his petition for Order to Show Cause re: Sale free and clear of liens and the Order thereon was duly issued under date of April 24, 1957, directed to various lien claimants, including Hansen Sargent Lumber Company and T. F. Korherr. Thereafter, on the 25th day of April, 1957, the said Hansen Sargent Lumber

Company and T. F. Korherr filed their answer to the foregoing Petition. That on the 25th day of April, 1957, a Stipulation was entered into by the respective parties to the effect that the parties agreed to submit the matter upon a Stipulation of Facts in writing to the Court. That, thereafter, it was verbally agreed by the parties that in lieu of an agreed "Stipulation of Facts" in writing the respective parties would set forth the facts in their various memoranda to be subsequently filed. That, while, the parties have filed memoranda of points and authorities, in addition the parties, through their attorneys, have set forth additional facts by way of oral argument at several hearings held before the referee, and the court now has sufficient knowledge gathered [6] from the memoranda and oral argument, and being fully advised in the premises, said cause being finally submitted, now makes the following:

Findings of Fact

1. That the claimant, Hansen Sargent Lumber Company, a copartnership, was a materialman as to the materials furnished the Bankrupt for the construction of a work of improvement on each of the following lots in Tract 4672, County of San Bernardino, State of California; 6, 7, 8 and 9; that said real property was then owned by the bankrupt, Mallard Pond Builders, Inc., a corporation.

2. That the balance of the value of the materials furnished by the claimant, Hansen Sargent Lumber

Company, to the bankrupt for such construction work on said real property was and is the sum of \$2,547.62, such materials being furnished the bankrupt from February 13, through August 3rd, 1956.

3. On or about August 13, 1956, pursuant to the provisions of Section 1190.1 of the California Code of Civil procedure, the claimant, Hansen Sargent Lumber Company, served written notice termed a "Stop Notice" on Perpetual Savings and Loan Association of Beverly Hills, as to Lots 6, 7, 8 and 9, of Tract 4672, for the withholding of funds being loaned to the bankrupt by said Association for building construction by the bankrupt as to said real property, said funds being still in the hands of said lender, and said stop notice requested that the sum of \$2,547.62 be withheld from bankrupt, being the balance of the value of the materials furnished by the said claimant to the bankrupt for work of improvement as to the aforementioned real property.

4. The stop notice above described and filed by Hansen Sargent Lumber Company was filed within the time provided by law for such remedy, and said claimant also filed with Perpetual Savings and Loan Association of Beverly Hills a bond as required [7] by Section 1190.1 of the California Code of Civil Procedure.

5. That at the time of the service of said Stop Notice and bond on Perpetual Savings and Loan Association of Beverly Hills, said Association had on

hand loan funds to be paid the bankrupt for work of improvement on said real property in excess of the amount set forth in the stop notice of Hansen Sargent Lumber Company.

6. That pursuant to order of this court all of the loan funds due the bankrupt and in the possession of Perpetual Savings and Loan Association of Beverly Hills at the time of the service of the stop notice of Hansen Sargent Lumber Company have been paid over to the Trustee in Bankruptcy, subject to determination by this court of the validity of such stop notice, and the stop notice of claimant T. F. Korherr.

7. On November 13, 1956, Hansen Sargent filed action No. 12564 in the Municipal Court of San Bernardino Judicial District, County of San Bernardino, State of California, naming bankrupt, Perpetual Savings and Loan Association of Beverly Hills and fictitious defendants as defendants. Said action was on the aforementioned Stop Notice and to foreclose a Mechanic's Lien founded on the same claim as said stop notice. This action was within the time provided by law for the bringing of such foreclosure action as to said stop notice.

8. The court costs of such action incurred by the plaintiff, Hansen Sargent Lumber Company, are \$19.55, and said claimant has also incurred \$2.80 cost in the filing of said mechanic's lien.

9. That between February 27, 1956, and October 5, 1956, T. F. Korherr, who at all times herein men-

tioned was and now is a flooring contractor, duly licensed as such under the laws of the State of California, pursuant to written contract with the bankrupt, furnished labor and materials for the flooring of [8] thirty-three (33) houses on the real property owned by the bankrupt. The reasonable and agreed value of said labor and material was and is the sum of \$13,046.50. Korherr was paid \$10,537.20 thereof, but the balance of \$2,509.30 has not been paid.

10. (a) On or about November 5, 1956, claimant T. F. Korherr served written notice, termed a "stop notice," on Perpetual Savings and Loan Association of Beverly Hills pursuant to the provisions of Section 1190.1 of the California Code of Civil Procedure, wherein he requested the withholding of funds being loaned to the bankrupt by said association for building construction by the bankrupt as to said real property, in the sum of \$2,509.30, being the balance of the value of labor and materials furnished by said claimant to the bankrupt for work of improvement as to said real property. Said stop notice was filed within the time provided by law for such remedy, if available to claimant, and said claimant also filed with said association a bond as required by Section 1190.1 of the California Code of Civil Procedure.

(b) At the time of service of said stop notice and bond, said association had on hand loan funds to be paid to the bankrupt for work of improvement on said real property in the excess of the sum of the amounts set forth in the stop notice of Hansen

Sargent Lumber Company aforementioned and claimant T. F. Korherr.

(c) In January 23, 1957, Korherr filed action No. 13165 in the Municipal Court of San Bernardino Judicial District, County of San Bernardino, State of California, naming said association and fictitious defendants as defendants. Said action was on the aforementioned stop notice. This action was within the time provided by law for the bringing of such action on said stop notice, if available to claimant. Court costs in the sum in excess of \$25.00 have been incurred by claimant Korherr in such action and that action to foreclose mechanic's liens herein referred to.

(d) The bankrupt entered into no general contract relative to the construction aforementioned, but entered into numerous individual contracts with plumbing contractors, flooring contractors, electrical contractors, sheet metal contractors, etc., and materialmen, similar to and including the contract into which it [9] entered with claimant T. F. Korherr. The bankrupt employed one Stan Schmidt to supervise all of the construction; said Stan Schmidt was the holder of a general contractor's license issued by the State of California and was designated by the bankrupt as its responsible managing employee.

11. That the Trustee has in his possession funds paid over to him by Perpetual Savings and Loan Association of Beverly Hills, subject to Stop Notice of Hansen Sargent Lumber Company and that said

claimant is justly entitled to the full amount of his claim set forth in said Stop Notice, in the sum of \$2,547.62 together with \$19.55 court costs and \$2.80 mechanic's lien filing costs, all of which should be paid by the Trustee out of the said funds paid over to him by the lending institution, Perpetual Savings and Loan Association of Beverly Hills. That the remaining amount of such funds are part of the estate of the bankrupt subject to the claims of general creditors.

12. That on October 10, 1956, Korherr recorded mechanic's liens on Lots 8, 9, 20, 23, 65, 7 and 21, having furnished labor and materials in the value of \$416.50 as to Lot 8; \$416.50 as to Lot 20; \$416.50 as to Lot 23; \$416.50 as to Lot 65; \$381.00 as to Lot 6; \$381.00 as to Lot 21, and \$81.00 as to Lot 9. That said liens were filed in the time provided by law.

13. That on January 8, 1957, the claimant, T. F. Korherr, filed action No. 13010, in the Municipal Court of San Bernardino Judicial District, State of California, naming bankrupt and fictitious defendants as defendants. That said action of foreclosure was within the time provided by law for the bringing of such suit.

14. That the claimant, T. F. Korherr, has valid mechanic's liens in the sums set forth therein as to each of lots 8, 9, 6, 20, 21, 23, 65, and that said lien rights in such sums set forth in said liens attach to the proceeds the Trustee has received for the equity of the estate as to each of such lots as a result

of the recent sale of said real property by the Trustee. [10]

15. That the right of the claimant, T. F. Korherr, to have said mechanic's liens satisfied out of the proceeds received by the Trustee from the sale of the real property of the estate, attributable to said lots, should be held in abeyance pending the determination by this court of the right of other claimants contending for mechanic's liens as to each of these lots.

From the foregoing findings of fact, the court derives and makes the following:

Conclusions of Law

1. That the claimant, Hansen Sargent Lumber Company, is a materialman and has a valid right, by virtue of his Stop Notice, remedy validly and properly exercised, to the sum of \$2,547.62, plus \$19.55 court costs and \$2.80 costs of filing mechanic's lien, all of which should be paid out of the funds paid over to the Trustee by the lending institution, Perpetual Savings & Loan Association of Beverly Hills.

2. That the claimant, T. F. Korherr, is a contractor and therefore not entitled to avail himself of the Stop Notice remedy; that therefore Stop Notice of said claimant is invalid and imposes no claim or lien upon the funds paid over to the Trustee by the lending institution, Perpetual Savings and Loan Association of Beverly Hills.

3. That the Trustee shall make available for the satisfaction of general creditors claims all of the funds paid over to him by the lending institution, Perpetual Savings and Loan Association of Beverly Hills, not required to satisfy the sums due Hansen Sargent Lumber Company by virtue of its Stop Notice and costs incurred therein.

4. That the claimant, T. F. Korherr, has valid mechanic's liens in the sums set forth therein as to each of lots 6, 8, 9, 20, 21, 24, 65 of Tract No. 4672, and that such liens attach to the proceeds attributable to each such lot derived by the Trustee from the sale of such real property belonging to the bankrupt.

5. That the right of the claimant, T. F. Korherr, to have such mechanic's liens satisfied out of the proceeds received by the Trustee from the sale of the real property of the estate attributable to said lots, shall be held in [11] abeyance pending the determination by this court of the rights of other claimants contending for mechanic's liens as to each of these lots.

Dated: 11/13, 1957.

/s/ OLIVER M. CHARLEVILLE.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 17, 1957. [12]

In the United States District Court, Southern
District of California, Central Division

Bankruptcy No. 76443-PH

In the Matter of:

MALLARD POND BUILDERS, INC., a Corpora-
tion,

Bankrupt.

JUDGMENT AS TO STOP NOTICES

On April 24, 1957, the Trustee filed his petition for Order to Show Cause re: Sale free and clear of liens and the Order thereon was duly issued under date of April 24, 1957, directed to various lien claimants, including Hansen Sargent Lumber Company and T. F. Korherr. Thereafter, on the 25th day of April, 1957, the said Hansen Sargent Lumber Company and T. F. Korherr filed their answer to the foregoing Petition, setting forth their claims to portions of building loan funds in the hands of Perpetual Savings and Loan Association of Beverly Hills to be paid the bankrupt under agreement between the lender and the bankrupt. These claims were based on Stop Notices served by Hansen Sargent Lumber Company and T. F. Korherr on the lender. That on the 25th of April, 1957, a Stipulation was entered into by the respective parties to the effect that the parties agreed to submit the matter upon a Stipulation of Facts in writing to the Court: That, thereafter, it was verbally

agreed by the parties that in lieu of an agreed [14] "Stipulation of Facts" in writing, the respective parties would set forth the facts in their various memoranda to be subsequently filed. That the parties have filed such memoranda of points and authorities, and, in addition, the parties through their attorneys have set forth additional facts by way of oral argument before this Court, and the cause having been submitted for decision, and the Court having heretofore made and caused to be filed its written findings of fact and conclusions of law,

It Is Ordered, Adjudged and Decreed

1. That the claimant, Hansen Sargent Lumber Company, is a materialman and has a valid right, by virtue of its Stop Notice, validly and properly exercised, to the sum of \$2,547.62, plus \$19.55 court costs and \$2.80 for costs of filing a mechanic's lien, all of which sums shall be paid out of the building loan funds transferred to the Trustee by the lending institution, Perpetual Savings and Loan Association of Beverly Hills.

2. That the claimant, T. F. Korherr, is a contractor and therefore not entitled to avail himself of the Stop Notice remedy. That therefore the Stop Notice of said claimant is invalid and imposes no claim or lien upon the building loan funds paid over to the Trustee by the lending institution, Perpetual Savings and Loan Association of Beverly Hills.

3. That the Trustee shall make available for the satisfaction of the claims of general creditors all of the building loan funds transferred to him by Perpetual Savings and Loan Association of Beverly Hills not required to satisfy the sums due Hansen Sargent Lumber Company by virtue of its Stop Notice and the costs incurred therefor.

4. That the claimant, T. F. Korherr, has valid mechanic's liens in the sums set forth therein as to each of Lots 6, 8, 9, 20, 21, 24 and 65 of Tract No. 4672, and that said liens attach to the proceeds attributable to each such Lot derived by the [15] Trustee from the sale of such real property.

5. That the right of the claimant, T. F. Korherr, to have such mechanic's liens satisfied out of the proceeds attributable to each such lot derived by the Trustee from the sale of such real property shall be held in abeyance and subject to the determination by this court of the rights of other claimants contending for mechanic's liens as to each of these lots.

Dated: 11/13, 1957.

/s/ OLIVER M. CHARLEVILLE.

[Endorsed]: Filed November 13, 1957. [16]

[Title of District Court and Cause.]

ORDER ON REVIEW OF REFEREE'S ORDER,
DATED NOVEMBER 13, 1957

The learned Referee has determined that T. F. Korherr, the petitioner, is a contractor as that term is used in Secs. 1181 and 1190.1 of the California Code of Civil Procedure, and as such is not entitled to avail himself of the "Stop Notice" remedy authorized by Sec. 1190.1. Petitioner feeling himself aggrieved by that holding brought on the instant petition to review.

After hearing counsel, the referee's report is adopted.

April 2, 1958.

ALEXANDER BICKS,
United States District Judge.

Certified true copy.

[Endorsed]: Filed and entered April 3, [17]
1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that creditor claimant T. F. Korherr hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that Order

on Petition for Review entered in the above matter on April 3, 1958, and from the whole thereof.

Dated: April 29, 1958.

/s/ EDGAR C. KELLER,
Attorney for T. F. Korherr.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 1, 1958. [18]

[Title of District Court and Cause.]

AGREED STATEMENT AS RECORD
ON APPEAL

Inasmuch as the parties hereto believe that the questions presented by the appeal of T. F. Korherr to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause can be determined without an examination of all the pleadings, evidence, and proceedings in the District Court, including those before the Referee in Bankruptcy, the parties have prepared and signed a statement of the case showing how the questions arose and were decided in the District Court, and setting forth only such of the facts as are essential to the decision of the questions by the Court of Appeals.

The parties designate the following to be copied herewith as part of this Agreed Statement:

1. "Exhibit A" from Claimant's Statement of Facts and Memorandum of Points and Authorities,

which was admitted into evidence by stipulation in the proceedings before the Referee in Bankruptcy.

2. Referee's Decision.

3. Findings of Fact and Conclusions of [20] Law.

4. Judgment as to Stop Notices.

5. Judgment of District Court, with filing date.

6. Copy of Notice of Appeal, with filing date.

7. Statement of Points to be relied upon by appellant.

Facts

On September 12, 1955, the bankrupt entered into a series of building loan agreements with First Federal Savings and Loan Association of Beverly Hills, subsequently known as Perpetual Savings and Loan Association of Beverly Hills and herein referred to for the sake of brevity as "Perpetual." A copy of such agreement is marked "Exhibit A," attached hereto, and made a part hereof. Each of the other of such agreements was identical save for the lot number. Simultaneously with the execution of said loan agreements, the bankrupt executed standard notes and deeds of trust covering the lots affected by the loan agreements.

On or about March 5, 1956, the bankrupt entered into building loan agreements with Perpetual of a similar nature, save for the amounts and the lots involved. All of the lots in connection with which the loan agreements herein referred to were made

were located in the County of San Bernardino, California.

The deeds of trust executed at the time the loan agreements were executed were subsequent in time to deeds of trust of which one Fred Loehr was beneficiary, but said Fred Loehr subordinated his deeds of trust to those referred to hereinabove of which Perpetual was beneficiary. Thus, for most purposes, the bankrupt may be considered the owner of the property and Perpetual the holder of the first deeds of trust.

Following the execution of each of these series of loan agreements referred to above, the bankrupt commenced construction of houses and garages on the lots for which loans had been obtained. The proceeds of the loans were not disbursed, however, except as [21] progress payments during the course of the construction in accordance with the schedules set forth in the agreements.

Pursuant to a contract made directly with the bankrupt, appellant T. F. Korherr, a licensed flooring contractor, furnished labor and materials for the flooring of houses on the aforementioned lots. Appellant has never been licensed as a general contractor. He did not contract to do any work on the subject property other than the flooring, and he did no work thereon other than flooring. Korherr was paid in part, but a balance of \$2,509.30 was never paid to him. Within the time required by law, and prior to the adjudication in bankruptcy, appellant filed with Perpetual a stop notice accom-

panied by a bond pursuant to Section 1190.1 (h) of the California Code of Civil Procedure. Thereafter, and within the time required by law, petitioner commenced an action in the California Courts on this stop notice. Said stop notice, bond, and suit were properly and timely filed as provided by law for such remedy, if such remedy was properly available to appellant; whether such remedy was available to appellant is the issue on this appeal.

The bankrupt entered into no general contract relative to the construction aforementioned but entered into numerous individual contracts with plumbing contractors, flooring contractors, electrical contractors, sheet metal contractors, etc., and materialmen similar to and including the contract into which it entered with appellant. The bankrupt employed one Stan Schmidt to supervise all of the construction; said Stan Schmidt was the holder of a general contractor's license issued by the State of California and was designated by the bankrupt as its responsible managing employee.

At the time that appellant served his written stop notice on Perpetual, Perpetual held funds in the construction loan account in an amount sufficient to satisfy all stop notice claims, namely that of appellant and that of Hansen Sargent Lumber Company, no [22] other claim having been filed at any time.

The three paragraphs immediately preceding this one represent a summary of facts as found by the

Referee in his Findings of Fact, a copy of which is attached hereto. The parties accept as correct and adopt all of said Findings of Fact and incorporate them herein, but have summarized them merely for the convenience of the court.

Proceedings

This matter first came before the Referee in Bankruptcy on a hearing on an Order to Show Cause pursuant to a petition by the Trustee in Bankruptcy. By that order, appellant herein together with Hansen Sargent Lumber Company and Perpetual Savings and Loan Association, were ordered to show cause why the funds held in the construction loan account by Perpetual should not be paid over to the Trustee in Bankruptcy. The Trustee's Petition alleged that the construction loan funds constituted an asset of the estate; that appellant and Hansen Sargent claimed an interest in the funds by reason of stop notices filed against same; but that the claims of appellant and Hansen Sargent were invalid under Sections 67 and 70 of the Bankruptcy Act.

Appellant and Hansen Sargent filed an Answer to the Trustee's Petition alleging, *inter alia*, that they claimed an interest in the funds by reason of their stop notices which had been filed, accompanied by bonds, and properly sued upon in state court, and denying that their claims were invalid. At the hearing on the Order to Show Cause it was orally stipulated that such facts as were set forth in a

Memorandum of Points and Authorities to be filed by Appellant and Hansen Sargent might be considered true unless the Trustee should object. Additional facts were received by the Referee subsequently without objection by either side, and there is no dispute now as to the facts. [23]

For the sake of convenience in administration, it was stipulated that Perpetual might pay to the Trustee the disputed funds and the Trustee would hold same in trust, subject to the claims of Hansen Sargent and appellant as they might be subsequently determined by the court.

Thereafter, the Referee filed a "Referee's Decision." Thereafter, Findings of Fact and Conclusions of Law were made, a copy of which is attached hereto, and "Judgment as to Stop Notice," was entered thereon. By his Decision, Conclusions, and Judgment, the Referee held that the stop notice filed by Hansen Sargent was valid and Hansen Sargent was entitled to that portion of the funds originally held by Perpetual equal to its stop notice claim and court costs, but that Appellant was a contractor within the meaning of the exclusionary provisions of CCP Section 1190.1 (h) and could not avail himself of the stop notice remedy.

Appellant filed a Petition for Review of the Referee's Order and Judgment. The District Court for the Southern District of Southern California made an order adopting the Referee's order. From this Order, Appellant prosecutes this appeal.

Issues

The sole question before the court on this appeal is this: May a flooring contractor who contracts directly with an owner-builder to furnish labor and materials for flooring, on a project on which the owner-builder does not have a general contractor, avail himself of the stop notice remedy provided by California Code of Civil Procedure, Section 1190.1 (h) as to construction loan funds?

Dated: May 16, 1958.

/s/ EDGAR C. KELLER,
Attorney for Claimant,
Appellant.

W. J. TIERNAN and
TONY GERAM,

By /s/ TONY GERAM,
Attorneys for Trustee in
Bankruptcy, Appellee.

[Endorsed]: Filed May 20, 1958. [24]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE
RELIED ON BY APPELLANT

In support of his Appeal herein, appellant T. F. Korherr will rely on the following points:

(1) The Referee erred in concluding and determining (Findings of Fact and Conclusions of Law,

page 5, line 25, et seq.; Judgment, page 2, line 16, et seq.) that appellant was a contractor.

(2) The Referee erred in concluding and determining (Findings of Fact and Conclusions of Law, page 5, line 25, et seq.; Judgment, page 2, line 16, et seq.) that a contractor is not entitled to avail himself of the stop notice remedy provided by California Code of Civil Procedure, Section 1190.1 (h).

(3) The Referee erred in concluding and determining impliedly, (Findings of Fact and Conclusions of Law, page 5, line 25, et seq.; Judgment, page 2, line 16, et seq.) that appellant was a contractor within the meaning of California Code of Civil Procedure, Section 1190.1 (h).

(4) The Referee erred in holding that appellant's stop notice was invalid and imposed no claim upon the building loan fund, and ordering accordingly. [26]

(5) The District Court erred in each of the above respects in approving and adopting the decision of the Referee.

Dated: May 16, 1958.

/s/ EDGAR C. KELLER,
Attorney for Claimant,
Appellant.

[Endorsed]: Filed May 20, 1958. [27]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numebered 1 to 27, inclusive, containing the original:

Referee's Decision.

Findings of Fact and Conclusions of Law as to Stop Notices.

Judgment as to Stop Notices.

(Certified Copy) Order on Review of Referee's Order, dated November 13, 1957.

Notice of Appeal.

Agreed Statement as Record on Appeal.

Statement of Points to be relied on by Appellant.

B. "Exhibit A" from Claimant's Statement of Facts and Memorandum of Points and Authorities.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: May 26, 1958.

[Seal]

JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16037. United States Court of Appeals for the Ninth Circuit. T. F. Korherr, Appellant, vs. A. J. Bumb, Trustee in Bankruptcy of Mallard Pond Builders, Inc., Bankrupt, Appellee. Transcript of Record. Appeal From the United States District Court for the Southern District of California, Central Division.

Filed: May 27, 1958.

Docketed: June 2, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 16037

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

T. F. KORHERR,

Appellant,

vs.

A. J. BUMB, Trustee in Bankruptcy of Mallard Pond
Builders, Inc., Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

EDGAR C. KELLER,
302 Katz Building,
San Bernardino, California,
Attorney for Appellant.

FILED

JUL 25 1958

PAUL P. O'BRIEN, CLERK



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No. 16037
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

T. F. KORHERR,

Appellant,

vs.

A. J. BUMB, Trustee in Bankruptcy of Mallard Pond
Builders, Inc., Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts as to Jurisdiction.

Mallard Pond Builder's, Inc., a California Corporation, was adjudicated a bankrupt upon a Petition filed March 13, 1957, in the United States District Court, Southern District of California, Central Division. The matter was assigned Bankruptcy No. 76443-PH. Appellee A. J. Bumb was appointed trustee of the estate of the bankrupt and caused to be served upon Appellant T. F. Korherr, Hansen-Sargent Lumber Company, and Perpetual Savings & Loan Association (hereinafter referred to as "Perpetual") an Order to Show Cause why certain funds held in a construction loan account by Perpetual should not be turned over to the trustee. Appellant and Hansen-Sargent filed Answers to the trustee's Petition upon which the Order to Show Cause had been based, and issue was thereby joined. Following a stipulation of facts

and oral and written arguments, the Referee filed a written Referee's Decision and subsequently there were entered his Findings of Fact and Conclusions of Law and "Judgment as to Stop Notices," whereby he ruled in favor of Hansen-Sargent as against the trustee, but in favor of the trustee as against Appellant.

Appellant filed a Petition for Review in the aforementioned District Court, but the United States District Judge, Alexander Bicks, by order entered April 3, 1958, adopted the report of the Referee. Notice of Appeal was filed by Appellant on May 1, 1958.

A more detailed statement of the proceedings has been made a part of the agreed statement and may be found at pages 24 *et seq.* of the Transcript of Record.

Jurisdiction of the Court of Appeals exists under the provisions of Sections 47 and 48 of Title 11 of the United States Code Annotated.

Statement of the Case.

The factual background of this controversy is set forth as part of the agreed statement [Rep. Tr. p. 21 *et seq.*], as well as in the Findings of Fact [Rep. Tr. p. 7 *et seq.*]. It may be briefly summarized as follows:

The bankrupt entered into a series of construction loan agreements of a standard type with First Federal Savings and Loan Association of Beverly Hills, subsequently known as Perpetual Savings & Loan Association. A copy of one of the agreements has been made a part of the record. Simultaneously with the execution of the loan agreements, the bankrupt executed standard notes and deeds of trust covering the lots which were to be the sites of the construction to be financed by the loan agreements. Thereafter, the bankrupt did commence construc-

tion of houses and garages on the lots for which loans had been obtained. In accordance with the loan agreements, however, the proceeds of the loans were not disbursed except as progress payments in accordance with the agreed schedules.

Appellant, a licensed flooring contractor, furnished labor and materials for the flooring of houses on the aforementioned lots. This was done pursuant to a contract made directly with the bankrupt, as there was no general or prime contractor save in the sense that the bankrupt served as its own general contractor. The bankrupt entered into numerous individual contracts with plumbing contractors, flooring contractors, electrical contractors, sheet metal contractors, etc., and materialmen similar to that into which it entered with Appellant. The bankrupt did employ one Stan Schmidt, the holder of a general contractor's license, to supervise all construction, and it designated him as its responsible managing employee.

Appellant was paid only in part for the flooring which he furnished and installed. Pursuant to Section 1190.1 (h) of the California Code of Civil Procedure, therefore, he filed with Perpetual a so-called "stop notice" requesting the withholding of further payments to the bankrupt in a sum sufficient to pay Appellant's bill. This stop notice was filed within the time required by law and prior to the adjudication in bankruptcy. It was accompanied by a bond as set forth in said Section 1190.1(h). Also pursuant to the Code of Civil Procedure, and prior to the adjudication in bankruptcy, Appellant duly and properly filed an action in the California Courts on the stop notice.

At the time that Appellant served his stop notice on Perpetual, Perpetual held funds in the construction loan

accounts in an amount sufficient to satisfy all stop notice claims, namely those of Appellant and Hansen-Sargent.

As heretofore mentioned, this controversy arose out of an Order to Show Cause based on the Trustee's Petition alleging that the construction loan funds constituted an asset of the bankrupt's estate. Appellant and Hansen-Sargent claimed that to the extent necessary to satisfy their stop notices, the funds in the construction loan accounts were theirs and not assets of the estate. The Referee upheld the contention of Hansen-Sargent, holding its stop notice to have been valid, but held that Appellant's stop notice was ineffectual on the ground that Appellant was a contractor within the meaning of the exclusionary provisions of Code of Civil Procedure, Section 1190.1(h) and therefore not entitled to avail himself of the stop notice remedy. This ruling was adopted by the District Court.

There is no argument as to the facts. The primary question on appeal relates to whether the Referee's interpretation of Code of Civil Procedure, Section 1190.1(h), as adopted by the District Court, is correct. Specifically, the question is this: May a flooring contractor who contracts directly with an owner-builder to furnish labor and materials for flooring, on a project on which the owner-builder does not have a general contractor, avail himself of the stop notice remedy provided by California Code of Civil Procedure, Section 1190.1(h), as to construction loan funds?

Specification of Errors.

Appellant specifies as error the following conclusion of the Referee, set forth as Conclusion 2 [Rep. Tr. p. 14] and as item 2 of the Judgment [Rep. Tr. p. 17] as follows:

“2. That the claimant, T. F. Korherr is a contractor and therefore not entitled to avail himself of the Stop Notice remedy. That therefore the Stop Notice of said claimant is invalid and imposes no claim or lien upon the building loan funds paid over to the Trustee by the lending institution, Perpetual Savings and Loan Association of Beverly Hills.”

Appellant submits that he is not a contractor within the meaning of the exclusionary provision of Code of Civil Procedure, Section 1190.1(h), and therefore the Referee and the District Court erred in concluding, determining, and holding, as set forth above, as follows:

- (1) That Appellant was a contractor.
- (2) That no contractor is entitled to avail himself of the stop notice remedy.
- (3) That Appellant was a contractor within the meaning of Code of Civil Procedure, Section 1190.1(h).
- (4) That Appellant's stop notice was invalid and imposed no claim upon the building loan fund.
- (5) That Appellant had no claim upon the building loan fund.

With respect to (5) above, it is urged that such holding was error by reason of the provisions of the building loan agreement itself as well as under Code of Civil Procedure, Section 1190.1(h).

ARGUMENT.

I.

Historical Background of Stop Notices.

A Notice to withhold, or stop notice, is not identical with a mechanic's lien, but rather a cumulative remedy. (*Weldon v. Superior Court* (1903), 138 Cal. 427, 71 Pac. 502.) Nevertheless, its purpose is to supplement the mechanic's lien remedy and the stop notice law is inextricably intertwined with mechanic's lien law. It is thus desirable to consider something of the history of both mechanic's liens and stop notices in order properly to interpret Code of Civil Procedure, Section 1190.1(h). Mechanic's liens have always been favored in California law. The right to a mechanic's lien is guaranteed by the constitution. (*Cal. Const.*, Art. XX, Sec. 15.) This has been interpreted as a mandate to the legislature to protect this special class of persons—those who furnish labor and materials in building construction. In addition to the claim of lien against property, those so furnishing labor and materials have had for many years the right to serve upon the owner of property for the improvement of which the labor or materials were furnished a notice directing the owner to withhold from the payments to the general contractor a sufficient amount to cover the claim of the one serving the notice.

However, the courts and the legislature stripped the bare mechanic's lien of much of its value by taking from it the priority which it would have normally possessed over construction loan trust deeds. This was done by granting priority to construction loan trust deeds recorded before the commencement of work even though funds had not yet been advanced. (See *Cal. Code Civ. Proc.*, Secs. 1188.1 and 1189.1.) At the same time, be-

cause of the change in business customs, stop notices served upon owners on private construction had become ineffectual. Lending institutions, in order to control the loan funds, had generally commenced using loan agreements with provisions similar to those contained in the contracts in the case at bar [Ex. A] as follows:

“The net proceeds of this loan (as the term ‘net proceeds’ is defined in the Borrower’s Instructions executed in connection with this loan), upon recordation of the Deed of Trust, are to be placed on deposit with the Association, together with the sum of \$none to be deposited by the undersigned owner, in a special non-interest-bearing account entitled ‘LOANS IN PROCESS-BUILDING LOAN ACCOUNT,’ and the undersigned agree that the deposit of said sums in said account shall be conclusively deemed a full and complete consideration for said note and Deed of Trust and that such consideration shall be deemed to have been fully passed and paid to the undersigned owner. Such funds are to be paid out, and are to be used, for the purposes set out herein. Subject to the provisions of this agreement, the undersigned, and each of them, hereby irrevocably assign to the Association, as security for the obligations secured by said Deed of Trust and the due performance of this agreement by the undersigned or any of them, and for any other joint and/or several obligation or obligations of the undersigned or any of them to the Association, all of the right, title and interest of the undersigned or any of them in and to said account and all monies to be placed therein, specifically including amounts that may be deposited in said account from time to time in the future either by the undersigned or by the Association. The undersigned acknowledge that they, or any of them, have no right to the monies in said account other than to

have the same disbursed by the Association in accordance with this agreement, which disbursements the Association, upon its acceptance of this agreement herein, agrees to make, for the purpose, and upon the conditions set out herein. . . .

“The undersigned, and each of them, agree that all funds received hereunder are received in trust for the purpose of paying in full all contractors and/or materialmen and/or laborers (other than the undersigned) then or theretofore engaged in said construction, and that the undersigned shall not have any beneficial interest in said funds unless and until said purpose has been fulfilled.”

Under such an agreement, the owner of the property (who is the borrower) has no control over the funds, and a stop notice served upon him is valueless.

In order to carry out the spirit of the Constitution and replace in some manner that protection to those who had furnished labor and materials for construction which had been lost by the change in business customs and law above referred to, in 1951 the legislature passed those measures which are now found in Code of Civil Procedure, Section 1190.1(h) to (m) inclusive. These Sections provide for the filing of a stop notice with a party holding the construction loan funds, requesting that sufficient funds to be withheld to pay the claimant. This Section further provides that the holder of the funds may so withhold funds to answer such claims, but is obligated to do so only if the claimant files an appropriate bond undertaking to reimburse “the owner, contractor, or person holding such funds” for all damages that may be sustained by reason of such “equitable garnishment.”

Although this provision was first enacted in 1951, it had its roots in certain judicial rulings prior thereto. The

first of these was *Smith v. Anglo-Californian Trust Company* (1928), 205 Cal. 496, 271 Pac. 898. In that case there was a dispute between the administratrix of Smith, the owner-builder, and certain lien claimants as to who was entitled to the undisbursed balance of the construction loan fund. There was nothing in the loan agreement that obligated the lending institution to see that the money was paid to the lien claimants. The court held, however, that the borrower had induced the materialmen and subcontractors to part with their labor and materials in the belief that the loan funds would be used to pay their bills and that the borrower was therefore estopped to deny the right of the subcontractors and materialmen to have the funds so applied.

In *Pacific Ready-cut Homes v. Title Insurance Trust Company* (1932), 216 Cal. 447, 14 P. 2d 510, the Supreme Court referred to the *Smith* case as having been decided upon the dual grounds of estoppel and that the lien claimants had an "equitable lien" on the funds. In *Whiting-Mead Company v. Westcoast Bond and Mortgage Company* (1944), 66 Cal. App. 2d 460, 152 P. 2d 629, the court held in a similar situation that it was the duty of the trustee to pay the funds to those who helped build the building.

It may be assumed that the aforementioned legislation of 1951 was enacted in the light of these and similar cases with a view to giving legislative sanction to the principles that had been judicially established, as well as to settle certain questions of priorities that had arisen. (See *Hayward Lumber Company v. Coast Federal Savings and Loan Association* (1941), 47 Cal. App. 2d 211), and to provide a definite procedure for the perfecting of claims against construction loan funds.

II.

The Legislative Intent of Section 1190.1 Requires Sustaining Appellant's Stop Notice Right.

The primary rule of statutory construction is that the intention of the legislature, if ascertainable, must be given effect.

Union Iron Works v. IAC (1922), 190 Cal. 33, 210 Pac. 410;

United States v. Dodson (1920), 268 Fed. 397.

The language of a statute should never be so construed as to nullify the intention of the legislature.

Chambers v. Satterlee (1871), 40 Cal. 497, 524.

Code of Civil Procedure, Section 1190.1(h), commences as follows:

“Any of the persons mentioned in Sections 1181 and 1184.1, *except the contractor* at any time prior to the expiration of the period within which claims of lien must be filed for record, . . . (may file a notice to withhold)”. (Emphasis added.)

The Referee and District Court held that Appellant “is a contractor and therefore not entitled to avail himself of the Stop Notice remedy” [Rep. Tr. pp. 14-17]. The Appellee has heretofore conceded in the briefs filed with the District Court that sub-contractors are entitled to the remedy of the stop notice. In any event, that question has already been settled by the Ninth Circuit Court of Appeals. (*Welles v. Portuguese-American Bank* (1914), 211 Fed. 561.) But, the Referee's ruling implies, the Appellant made his contract to furnish flooring directly with the owner-builder, and, therefore, is a contractor rather than a sub-contractor. And, the Referee's ruling further implies, all contractors are precluded from filing stop

notices by the exclusionary phrase above quoted. Apparently there was no doubt in the minds of the Referee and District Court that Appellant would have been entitled to serve a stop notice if there had been a general contract or if the general contractor had been someone other than the owner of the real property. The ruling of the lower court would thus permit flooring contractors, plumbing contractors, painting contractors, etc., to file stop notices where an intervening general contractor is involved but not where the owner himself lets out the contracts to the flooring, plumbing, and painting contractors. No purpose is served by such a distinction.

The Legislative intent in enacting Code of Civil Procedure, Section 1190.1(h) to (m) was undoubtedly to enable the furnishing of labor and materials in reliance on a security interest in the construction loan funds. Under the ordinary construction loan agreements, the general contractor is entitled to progress payments as various phases of the construction are completed. The fulfillment of the Legislature's intention requires that anyone—be he a laborer, a materialman, a flooring contractor, or otherwise—who is entitled to be paid by the general contractor, but who has not been so paid, may file a stop notice with the construction lender setting forth the fact that the general contractor has failed to pay him and requesting the lender to withhold from the general contractor to the stop notice claimant. In that manner, the claimant may perfect his security interest in the loan funds. It is completely immaterial to the purposes of this section whether a flooring contractor was an "original contractor." To hold that he, as well as every plumbing contractor, painting contractor, plastering contractor, roofing contractor, electrical contractor, etc., is barred from

filing a stop notice against construction loan funds whenever an owner-builder acts as general contractor would be to deprive the sub-contractor of his stop notice remedy in a majority of cases and to emasculate the salutary remedy provided by the law.

III.

The Phraseology of Code of Civil Procedure, Section 1190.1(h) Requires Sustaining Appellant's Stop Notice Right.

It will be recalled that the Code Section in question commences, as follows:

“Any of the persons mentioned in Sections 1181 and 1184.1, except *the* contractor . . . (may file a notice to withhold)” (Emphasis added.)

Section 1181 refers to

“mechanic's, materialmen, contractors, sub-contractors, artisans, architects, machinists, builders, teamsters, and draymen, and all persons and laborers of every class performing labor upon or bestowing skill or other necessary service upon, or furnishing materials to be used or consumed in . . .”

Section 1184.1 refers to those who grade or pave streets or install sewers.

Appellant submits that the use of the words, “except *the* contractor,” makes it obvious that only one contractor on each job was to be excluded, namely the general or prime contractor. That the word, “contractor” is here used in the sense of a general contractor is further indicated by the subsequent reference in the second paragraph of the same sub-section to the payment from the bond of costs awarded against “the owner, contractor, or person holding such funds” and damages that such “owner, con-

tractor, or person holding such funds may sustain by reason of the equitable garnishment effected by the claim . . .”. Again at the end of said sub-section, it is stated that

“No assignment by the owner *or contractor* of construction loan funds, whether made before a verified claim is filed, or after such claim is filed, shall be held to take priority over claims filed under this sub-section (h) . . .” (Emphasis added.)

It is obvious that throughout this sub-section “the contractor” is bracketed with the owner and the “person holding the construction loan funds” because he—the general contractor—is the person to whom the lending agency normally pays the progress payments. Obviously he can derive no beneficial interest from a stop notice directing the withholding of payments to himself until he has been paid by himself, other than to confuse the lending agency as to the total amount of legitimate stop notices. Therefore, the Legislature mentioned that he was excluded from the remedy.

The Legislature did not exclude “a contractor,” nor did it exclude “the contractors.” It excluded “the contractor.” The use of the specific article “the” together with the singular “contractor,” should be interpreted to mean just what it says—one contractor on a job, the prime contractor, the same one that is subsequently given the right to recover on the claimant’s bond if he has been damaged by a stop notice.

It is well recognized that mechanic’s lien statutes are remedial and to be liberally construed to effect their salutary purpose. (*Gallagher v. Compondonicio* (1931), 121 Cal. App. Supp. 765. Words of exception to a law

are to be strictly construed to limit the exception, particularly where the law itself is one entitled to a liberal construction.

Piedmont and N. R. Company v. ICC, 286 U. S. 299, 76 L. Ed. 1115, 52 S. Ct. 541;

United States v. Scharton, 285 U. S. 518, 76 L. Ed. 917, 51 S. Ct. 416;

Dean v. McMullen, 109 Ohio St. 309, 142 N. E. 683.

IV.

If There Be Ambiguity in the Phraseology of Code of Civil Procedure, Section 1190.1(h), the Construction Loan Agreements Resolve Same.

The construction loan agreements specifically provide [Ex. A, Par. 7]:

“The undersigned, and each of them, agree that all funds received hereunder are received in trust for the purpose of paying in full all contractors and/or materialmen and/or laborers (other than the undersigned) then or theretofore engaged in said construction, and that the undersigned shall not have any beneficial interest unless and until said purpose has been fulfilled.”

This agreement was written in the light of the law, legislative and judicial, above referred to. As a standard provision in such agreements, it is indicative of the interpretation placed on the code by the lending institutions and contractors who deal with these matters regularly.

Moreover, the parties specifically and expressly placed the construction loan funds in trust for Appellant and his fellow contractors, materialmen, and laborers, and provided that the bankrupt should have *no* interest therein

until the contractors, materialmen, and laborers were paid. Under these provisions, it is unnecessary for Appellant to rely on Code of Civil Procedure, Section 1190.1(h), as he is a third party beneficiary of the agreement and the beneficiary of the trust thereby created. The Appellee, as successor to the bankrupt, can have no beneficial interest in said funds until Appellant has been paid.

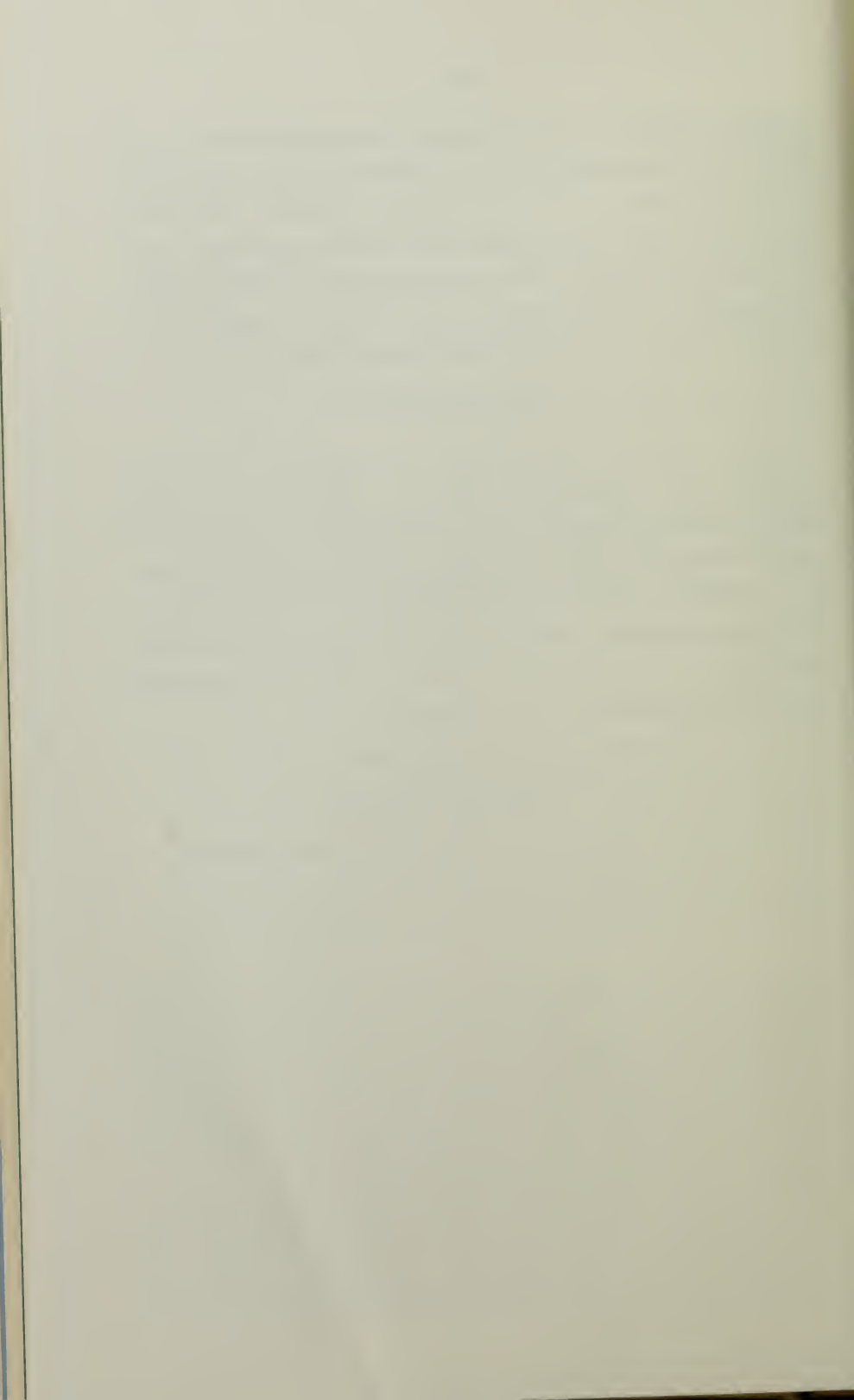
Conclusion.

As the complete effectuating of the salutary remedy intended by the Legislature requires a construction which would permit all contractors other than the prime contractor on a job to file stop notices, and as Appellant was the beneficiary of the construction loan funds both by the terms of the law and the terms of the construction loan agreement, it is submitted that the order and judgment appealed from should be reversed.

Respectfully submitted,

EDGAR C. KELLER,

Attorney for Appellant.



No. 16037

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

T. F. KORHERR,

Appellant,

vs.

A. J. BUMB, Trustee in Bankruptcy of Mallard Pond
Builders, Inc., Bankrupt,

Appellee.

BRIEF OF APPELLEE.

FILED

AUG 25 1958

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Builders, Inc., Bankrupt,

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BRIEF OF APPELLEE.

Statement of Pleadings and Facts as to Jurisdiction.

The respondent, A. J. Bumb, Trustee in Bankruptcy of Mallard Pond Builders, Inc., Bankrupt, has nothing to add to the Statement of Pleadings and Facts as to Jurisdiction set forth in Appellant's Opening Brief and concurs with such.

Statement of Case.

As indicated in Appellant's Statement of the Case in his Opening Brief, the factual background of the case is set forth in the Agreed Statement [Rep. Tr. p. 21 *et seq.*], and in the Findings of Fact [Rep. Tr. p. 7 *et seq.*].

Respondent has no quarrel with appellant's summary of the factual background of the case. However, it should be noted that Hansen-Sargent Lumber Company, whose stop notice was upheld by the Referee, was a materialman furnishing lumber for the construction of the 33 houses in

the tract being constructed by the bankrupt [Referee's Decision, Tr. of R. p. 2]. In contract, T. F. Korherr, the appellant, was found to be a contractor, furnishing not only materials but also labor in connection with the flooring of the houses in the tract.

Issue.

The issue as set forth in the last paragraph of page 4 of Appellant's Opening Brief is, of course, quoted verbatim from the Agreed Statement on page 5 thereof, and respondent has joined in the framing of said issue, which is as follows:

May a flooring contractor, who contracts directly with an owner builder to furnish labor and materials for flooring, on a project on which the owner builder does not have a general contractor, avail himself of the stop notice remedy provided by California Code of Civil Procedure, Section 1190.1(h) as to construction loan funds?

Comment of Appellant's Specification of Errors.

Respondent submits that appellant's specification of error entitled No. 5, set forth on page 5 of his Opening Brief, incorrectly states the holding of the Referee in his Findings of Fact and Conclusions of Law [Rep. Tr. p. 14] and in his Judgment [Rep. Tr. p. 17].

This 5th specification of error by appellant is stated as follows:

(5) That appellant had no claim upon the building fund.

The Referee's Conclusion 2 and his Judgment, Item 2, indicate that appellant has no claim upon the building loan fund by virtue of the Stop Notice.

This qualification of no such claim or lien by reason of the Stop Notice is lacking in the 5th specification of error by appellant and distorts the actual ruling of the referee. Respondent submits the general creditors of the bankrupt do have a claim on such funds, and the appellant may very well qualify as a general creditor. However, the Referee held that there was no such claim by virtue of a stop notice remedy to which appellant was not entitled.

ARGUMENT.

I.

Introduction.

Respondent's position may be briefly summarized as follows: The Referee and District Court have ruled that the appellant is a contractor within the meaning of that term as used in Section 1190.1(h) of the Code of Civil Procedure of California setting forth the stop notice remedy on construction loan funds; that under said section, the contractor is excluded from such remedy, and therefore such remedy is not available to the appellant. The respondent contends that the Referee and District Court have not erred in the position they have taken in this controversy for reasons which are set forth hereinafter.

II.

Reply to Point I of Appellant's Argument.

The loan agreement involved in this case between the bankrupt and the lending institution provided that the building construction funds loaned should be used for those contributing to the work of construction.

In the case at hand, a substantial majority of the general creditors of the bankrupt were materialmen, laborers or original contractors who contributed to the construction. They, either through neglect, or because the remedy was not available, did not file stop notices. Nonetheless, under the provisions of the building construction loan agreement [Ex. A], they are no less entitled to share in such funds than the appellant who has filed a stop notice which the Referee and District Court found invalid. Nothing in the loan agreement indicates appellant occupies a superior position to that of the great majority of the general creditors who likewise helped in the construction of the bank-

rupt's houses. Yet it would appear appellant is in effect contending he should have a position superior to other creditors who aided in the construction solely by virtue of such attempted stop notice.

The appellant in fact received considerably more in payment of his total contract price from the bankrupt than did a number of other creditors prior to bankruptcy. The Sun Lumber Company, for example, a general creditor who furnished most of the lumber for the project, received much less of a percentage of its total contract price than did appellant. The Sun Lumber Company even now has a general creditor's claim of in excess of \$20,000.00 against the bankrupt.

The Referee's decision, concurred in by the District Court, would result in the sum claimed by appellant under his stop notice being given over to the general creditor's fund, where it would be shared in by many other creditors who likewise aided in the construction of the bankrupt's houses.

III.

Reply to Point II of Appellant's Argument.

Appellant contends under Point II of his Argument in his Opening Brief that the legislative intent of Section 1190.1 requires the sustaining appellant's stop notice right. The Trustee is convinced no such legislative intent is indicated.

Appellant cites no authority for this proposition, and respondent has been unable to find such authority in support of his contention.

It is interesting to note that appellant's argument at this stage of the appeal differs widely from his position when he was presenting argument before the District Court on

his petition for review. Then, appellant contended the Referee had inaccurately found him to be a subcontractor. As the Findings and Judgment of the Referee clearly indicate his decision was that T. F. Korherr was a contractor, this argument has apparently been abandoned by the appellant now. The Trustee has always conceded a subcontractor under 1190.1(h) of the Code of Civil Procedure of California has a right to the stop notice remedy. However, this remedy is not available to a contractor as that term is used in said code section and in other sections of the Code of Civil Procedure dealing with mechanic's liens and stop notices.

The Agreed Statement [Rep. Tr. p. 21 *et seq.*], summarized on page 3 of Appellant's Opening Brief, indicates appellant was a licensed flooring contractor, who furnished labor and materials for the flooring of houses being constructed by the bankrupt by way of a contract made directly with the bankrupt. There was no general contractor.

Appellant was not a subcontractor as that term is used in the mechanic's lien and stop notice statutes of California. In *Hihn-Hammond Lbr. Co. v. Elsom*, 171 Cal. 570, 154 Pac. 12, at page 14 of the Pacific Reporter citation, the Supreme Court of California stated:

"... The term 'sub-contractor' embraces all persons who agree with the original contractor to furnish the material and construct for him on the premises some part of the structure which the original contractor has agreed to erect for the owner."

In 32 Cal. Jur. 2d 614, Section 15, the meaning of the word "sub-contractor" is discussed as follows:

"The right to a mechanic's lien is extended to sub-contractors. Literally, a sub-contractor is one who

agrees with another to perform a part or all of the obligation the second party owes by contract to a third party. As used in the mechanic's lien law, however, the word has a narrower meaning. It embraces all persons who agree with the *original contractor* to furnish material and construct for him on the premises some part of the structure the original contractor has agreed to erect for the owner. . . ." (Emphasis added.)

Obviously, then the concept of subcontractor as used in the mechanic's lien and stop notice sections of the California Code of Civil Procedure indicates a three-party relationship, the subcontractor dealing with the original contractor who in turn deals with the owner. The situation before the court is clearly otherwise, being a two-party relationship, the appellant dealing directly with the bankrupt.

Since appellant was not a materialman nor a subcontractor in his dealings with the bankrupt, he was a contractor in such relationship as determined by the Referee and District Court.

The law of California provides that one furnishing labor and materials by dealing directly with the owner-builder is a contractor within the meaning of that term as used in the mechanic's lien law of the state.

In Section 14 of 32 Cal. Jur. 2d 612, the meaning of the word "contractor," as used in California mechanic's lien law, is discussed as follows:

" . . . In a general sense every party to any contract is a contractor, but the term as used in the statutes relating to mechanic's liens has a restricted meaning. It refers to one who, under contract with the owner, undertakes for a consideration to furnish the material, labor, and superintendence required in the improve-

ment of the owner's premises, either in the erection of a structure thereon or in the alteration or repair of one in existence. 'Contractor' therefore means one who by his skill, labor or materials creates or improves the property of another. It includes a painter who contracts with the owner to paint a building and furnish the necessary materials. . . . *And one may be an original contractor though he has agreed to do only a part of the work required for the construction of a building.*" (Emphasis added.)

In a leading case, *Pugh v. Moxley*, 164 Cal. 374, 128 Pac. 1037, at page 1039 of the Pacific Reporter citation, the Supreme Court of California repeats this definition of the word "contractor" as used in the mechanic's lien laws of California, as follows:

"... On the other hand, one may be an original contractor although he has agreed to do only a part of the work required for the construction of a building."

See also:

La Grill v. Mallard, 90 Cal. 373, 27 Pac. 294.

Clearly, the appellant, T. F. Korherr, was a "contractor" in his relationship with the bankrupt, and as that word is used, in accordance with California Supreme Court interpretation, in the mechanic's lien laws of California. He agreed to do a part of the work of constructing various residential structures, by contract entered into directly with the owner-builder, the bankrupt, and in accordance with such contract furnished labor and materials for such purpose, namely the construction of floors in said residential structures.

And equally clearly, the appellant, T. F. Korherr, was not a "subcontractor" as that term is used in the mechanic's lien laws of California.

The mechanic's lien laws, and the stop notice remedy are closely related and interdependent. Section 1190.1(a)-(h) of the Code of Civil Procedure dealing with the stop notice remedy refers back to Sections 1181 and 1184.1 of the same code which deal with mechanic's liens, utilizing the same categories of persons entitled to mechanic's liens for entitlement to the stop notice remedies, with one exception, contractors. Therefore, it is logical to assume the meaning given to these various categories under the mechanic's lien laws are carried over into the stop notice remedy sections of the Code of Civil Procedure. Section 1190.1(h) of the Code of Civil Procedure of California provides, in part, as follows:

“Any of the persons mentioned in Sections 1181 and 1184.1, *except the contractor* at any time prior to the expiration of the period within which claims of lien must be filed for record, as prescribed by the provisions of Section 1193.1 of this code, may, in any instance in which the funds with which the cost of the work of improvements are, wholly or in part, to be defrayed from the proceeds of a building loan, give to the mortgagee, beneficiary under deed of trust, or assignee or successor in interest of either, or to any escrow holder or other party holding any funds furnished or to be furnished by the owner or lender or any other person as a fund from which to pay construction costs or arising out of a construction or building loan, a notice similar to the one provided for in subdivision (a) of this section, whereupon the person so given such notice under this section, may withhold funds to answer such claims and any lien that may be filed therefor, but shall be under no obligation to do so unless a bond is furnished as hereinafter provided.” (Emphasis added.)

Section 1181 of the Code of Civil Procedure sets forth the categories of persons entitled to mechanic's lien claims. Such categories include "mechanics, materialmen, contractors, subcontractors, artisans" and many others.

Thus, all of these categories of persons entitled to mechanic's lien claims under Section 1181 are likewise entitled to the stop notice remedy provided by Section 1193.1(h), with one very important exception, namely *the contractor*. Section 1193.1(h) clearly and explicitly states that the contractor cannot avail himself of the stop notice remedy.

Therefore, it follows that the appellant, T. F. Korherr, being embraced within the term "contractor," is not entitled to the stop notice remedy, and the Referee so held in his decision.

Appellant attempts to have the word "general" read into the meaning of "contractor" as used in Section 1193.1 of the Code of Civil Procedure of California. As already stated, there is not one iota of authority cited by appellant for such construction, nor can counsel for the trustee find such authority.

The meaning attributed to the word "contractor" as used in the stop notice remedy, Section 1190.1(h), and the companion subsection 1190.1(a), cannot be different from the meaning given to "contractor" as used in Section 1181, and to which section the stop notice Section 1190.1 refers. The word "general" as modifying "contractors" is not present in Section 1181 and the word "contractors" in that section includes all original contractors, namely those persons furnishing substantial labor and materials under contract made directly with the owner-builder, and include the appellant, T. F. Korherr.

IV.

Reply to Point III of Appellant's Argument.

Appellant argues that the phraseology of Code of Civil Procedure, Section 1190.1(h) requires sustaining of appellant's stop notice right. Trustee submits that court construction of the language contained in said section indicates the contrary. Sections 1190.1(a), (h) of the Code of Civil Procedure are derived from former Section 1184 of same code, which was superseded by such section (Deerings Code of Civil Procedure of California, 1949 edition, pp. 565 and 571). The phrase "the contractor" appears in both Section 1183 and Section 1184 of the Code of Civil Procedure, which were previously in effect before 1951, and these sections were replaced by new code sections. Section 1190.1 contains the bulk of former Section 1184, the latter being the section dealing with stop notice remedy prior to 1951.

Since the phrase, "the contractor," has been brought into the new Section 1190.1 from the previous Section 1184, and was likewise used in old Section 1183 of the Code of Civil Procedure, it is worthwhile to examine court interpretations of the meaning of such phrase, there being no indication the legislature, in using the same phraseology in adopting Section 1190.1, intended any new or different meaning to be given the phrase as interpreted in the earlier code section.

In *Pugh v. Moxley*, 164 Cal. 374, 27 Pac. 294, the Supreme Court of California indicated the phrase "the contractor" as used in former Sections 1183 and 1184 embraced the concept of an original contractor, one who had privity with the owner-builder and furnished substantial labor and materials by direct contract with the owner, and who did only a portion of the total work of improvement.

See also, *Russ Lumber & Mill Co. v. Garrettson* (1891), 87 Cal. 589, 25 Pac. 747; *Los Angeles Pressed Brick Co. v. Los Angeles Pac. Boulevard & Dev. Co.* (1908), 7 Cal. App. 460, 94 Pac. 775. Section 1184, the former stop notice remedy section, read in 1891 much as Section 1190.1 does now in respect to this phrase, as indicated by the following quotation of the old statute taken from *Russ Lumber & Mill Co. v. Garrettson* (*supra*) at page 748 of the Pacific Reporter citation.

“Any of the persons mentioned in Section 1183, *except the contractor*, may at any time give to the reputed owner written notice. . . .”

Section 1183 referred to was the former section setting forth the categories entitled to mechanic's liens, a substantial part of this section now being found in present Section 1181 of the Code of Civil Procedure.

Trustee's counsel has been unable to find any appellate cases in California where other than materialmen, subcontractors or laborers have utilized the stop notice remedy, whether under former Section 1184 of the Code of Civil Procedure or under the present Section 1190.1. No case has been found where one qualifying as an original contractor utilized such a remedy with appellate court approval. Nor has appellant cited any such cases in his Opening Brief, nor, for that matter, at any time in his previous arguments before the Referee and the District Court.

V.

Reply to Point IV of Appellant's Argument.

Appellant maintains on pages 14 and 15 of his Opening Brief that whether or not appellant properly can rely on Section 1190.1(h) of the Code of Civil Procedure, he is a third party beneficiary to the loan agreement and thus has superior rights to that of the Trustee.

The answer to this is that the loan agreement gives the same rights to all who have aided and contributed in the construction and this would include most of the general creditors of the bankrupt. The trustee represents not only the bankrupt but the creditors as well, and particularly the general creditors. This is set forth in Section 47 of the Bankruptcy Act (U. S. C., Tit. 11, Ch. 5, Sec. 75).

Appellant would have the court disregard the rights of these general creditors, represented by the trustee, who contributed to the construction, in some cases to a considerably greater degree than appellant, with less reward prior to bankruptcy, though their claim on the loan funds are equal in status to that of appellant.

Furthermore, the stop notice remedy now being statutory, if appellant is excluded from such remedy, he cannot assert the right he is denied by the claimed position of third party beneficiary as this would defeat the obvious intent of the legislature in barring him from such remedy.

VI.

Since the Legislature Has Treated Original Contractors, Including General Contractors, as One Common Category for the Filing of Mechanic's Lien, It Is Logical to Interpret the Meaning of "Contractor" in Section 1190.1(h) as Including Original Contractors.

Section 1193.1(b) and Section 1193.1(c) provide a 60-day period of time for the filing of mechanic's liens of original contractors if notice of completion is filed, and only 30 days for other categories, including subcontractors, materialmen and laborers. Here is evidence of the treatment as one category of general contractors and all others who qualify as original contractors such as the appellant, in regard to the mechanic's lien remedy, in contrast to all other categories. The appellant, along with general contractors, is entitled to 30 more days in which to file his mechanic's lien claims as against materialmen such as Hansen-Sargent Lumber Company and other categories. Here we have clear legislative intent indicating that all persons embraced within the concept of contractor, namely original contractors, whether general contractors or otherwise, are being placed in one common category as to preferred treatment in the matter of time given in which to file mechanic's liens as against all other categories of lien claimants. It is logical to assume that, given this preferred position together with general contractors as to filing of mechanic's liens, the appellant, as an original contractor, along with general contractors, is embraced within the meaning of the phrase, "the contractor," as used in an exclusionary manner, in Section 1190.1(h).

Conclusion.

Therefore, the Trustee submits that the decision of the Referee, concurred in by the District Court, holding that the stop notice remedy is not available to the appellant as he is embraced within the meaning of the phrase "the contractor" as used in the exclusionary manner in Section 1190.1(h) of the Code of Civil Procedure of California should be upheld.

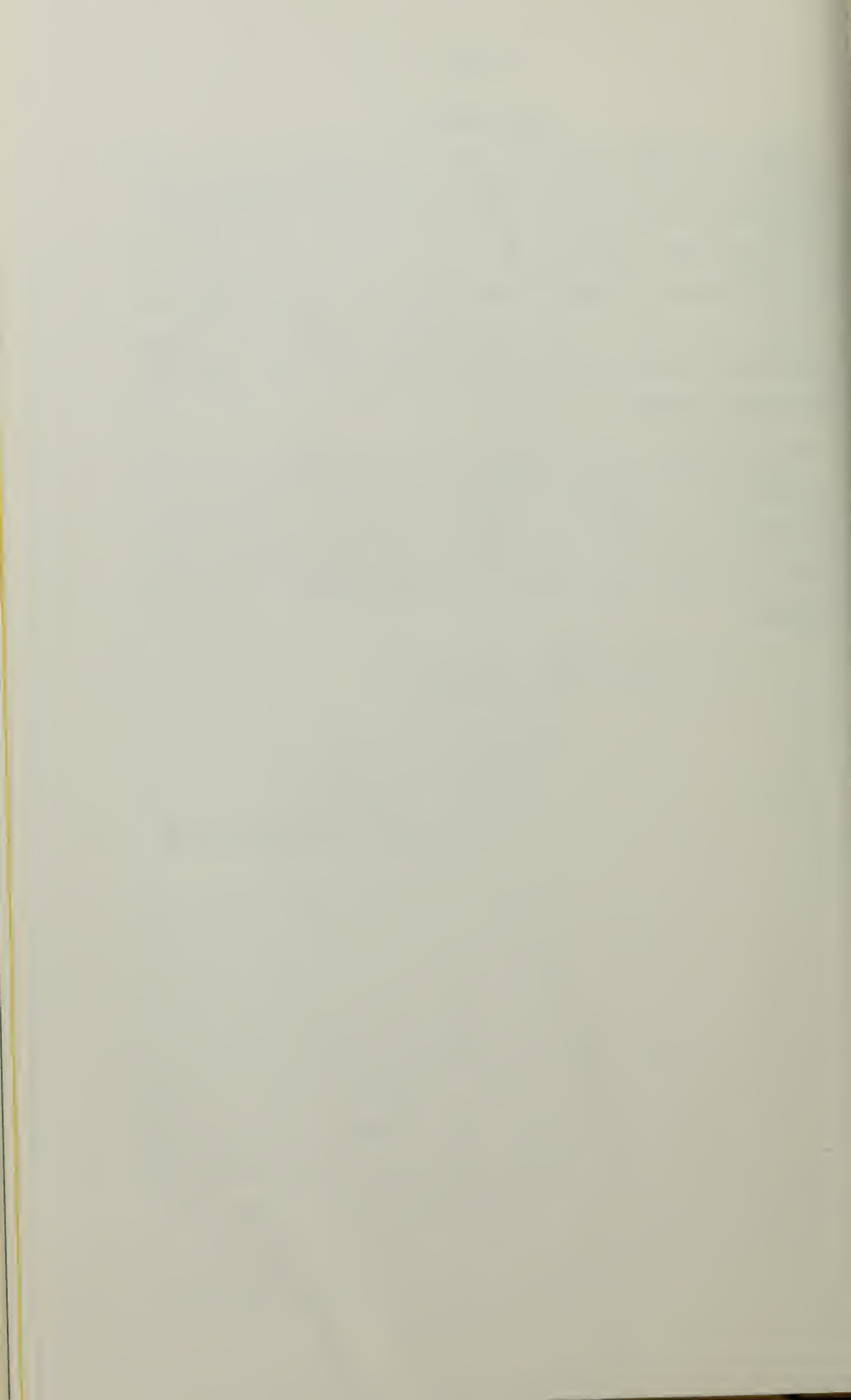
There should be no different meaning given the word "contractor" in Section 1190.1(h) of the Code of Civil Procedure than has been given it in the sections dealing with mechanic's lien remedy in such code where it is also found.

Respectfully submitted,

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By TONY GERAM,

Attorneys for Respondent.



No. 16037
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

T. F. KORHERR,

Appellant,

vs.

A. J. BUMB, Trustee in Bankruptcy of Mallard Pond
Builders, Inc., Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

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T. F. KORHERR,

Appellant,

vs.

A. J. BUMB, Trustee in Bankruptcy of Mallard Pond
Builders, Inc., Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

ARGUMENT.

I.

Historical Background of Stop Notices.

In his "Reply to Point I," respondent makes no reference to the matters set forth by appellant under this point. Rather, he argues a new and totally irrelevant point, namely, that some of the general creditors had furnished labor or materials to the construction and should be entitled to share equally with appellant even though they did not perfect their claims by filing stop notices. Although, in fact, it may be true that some of the general creditors did so furnish materials or labor, it certainly is not true that all did. To give the construction loan funds to the general creditors would be of only incidental benefit to those who furnished labor and materials in the construc-

tion, while giving the general creditors as a whole a windfall. In any event, the factual statements made by respondent are outside the record and totally irrelevant to the present determination.

Moreover, there is no reason why those who have not seen fit to expend the time and money for attorney fees and bond premiums necessary to perfect a stop notice right should share in the funds secured by the stop notice. Indeed, Code of Civil Procedure Section 1190.1(h) requires the lending institution to withhold only enough money to satisfy the stop notices filed; if that amount had then to be split among all creditors who furnished materials or labor, there would be little purpose for any one individual to file a stop notice.

II.

The Legislative Intent of Section 1190.1 Requires Sustaining Appellant's Stop Notice Right.

Again respondent goes outside the record in his reply to this point, asserting that appellant's argument is now different from that before the District Court. Such assertion is not only outside the record and immaterial, but also substantially in error. In the opening brief of appellant in the District Court, two questions were considered: whether a subcontractor was entitled to the stop notice remedy, and whether appellant was a contractor within the meaning of Section 1190.1(h) by reason of his having dealt directly with the owner. Respondent impliedly conceded the first point and thereafter the appellant's final brief and the oral argument centered about the second point.

Appellant's Point II was devoted to a consideration of the purpose of the Legislature in enacting Code of Civil

Procedure Section 1190.1(h). Appellant's Point III pointed out that the phraseology of Code of Civil Procedure, Section 1190.1(h) provides further indication of the purpose of the Legislature. In his reply to these points respondent ignores the history and logic of appellant's argument. Rather, respondent replies, not directly but obliquely, grounding his argument on the semantic quibble that since appellant was not a subcontractor (under terminology developed in an entirely different context) he was a contractor and, therefore, excluded from the benefits of Code of Civil Procedure, Section 1190.1-(h). He advances no reason why the Legislature should have so intended; he ignores the purpose of the law.

Appellant submits that laws have a purpose and that where a word such as "contractor" is so used as to create an ambiguity, the courts should adopt the interpretation that will promote the purpose of the law, not the interpretation which will defeat it.

It is well recognized that mechanics' lien statutes are remedial and to be broadly construed. Pursuant to this philosophy, the California Courts have held that a statute giving municipal courts jurisdiction in actions to foreclose liens of "mechanics, materialmen, artisans, and laborers" also gives jurisdiction to foreclose liens of contractors and subcontractors.

Gallagher v. Campodonico (1931), 121 Cal. App. (Supp.) 765.

Certainly, where there is an ambiguity as to who is to be embraced in the phrase, "the contractor," in a phrase excluding some individuals from the use of a remedy, the courts should resolve such ambiguity by adopting an interpretation limiting the exception rather than expanding it.

The purpose of the stop notice law is to permit one who has contributed to the construction of a building but is not in privity with the holder of the funds to intercept such funds before they are paid to one in privity with the holder. Code of Civil Procedure Section 1190.1(h) was written to exclude "the contractor," on the obvious assumption that there was only one contractor on each job—the person to whom progress payments are normally paid from construction loan funds. The distinction between an original contractor and a subcontractor, which respondent belabors for the bulk of his brief, is not pertinent to this case. As evidence of this, let us examine the cases he cites.

Respondent quotes a sentence from *Hihn-Hammond Lumber Company v. Elson* (1915), 171 Cal. 570, 154 Pac. 12. Appellant here wishes to quote not only that sentence, but also some of the sentences preceding it in order that the full context may be understood:

"Section 1194 divides the liens which can be asserted against property under the Mechanic's Lien Law into four classes, to wit, laborers, materialmen, subcontractors, and original contractors. The meaning of the term 'subcontractors,' as there used, must be determined by reference to this classification and to the subject to which it relates. *The original contractor is the person who agrees with the owner to construct a building on his property.* . . . The term 'subcontractor' embraces all persons who agree with the original contractor to furnish the material and construct for him on the premises some part of the structure which the original contractor has agreed to erect for the owner." (Emphasis added.)

It is apparent that appellant is not an "original contractor" under this definition any more than he is a sub-

contractor, as he did not agree to construct a building. Respondent's quotation from 31 *Cal. Jur.* 2d 614, of course, is based on this case. This illustrates the fallacy of attempting to apply definitions developed in one context to an entirely different factual and legal situation.

Similarly, respondent has no quarrel with the cases of *Pugh v. Moxley* (1912), 164 Cal. 374, 128 Pac. 1037, and *LaGrill v. Mallard* (1891), 90 Cal. 373, 27 Pac. 294, cited by respondent for the proposition that one may be an original contractor although he has agreed to do only a part of the construction of a building. These cases involved interpretations of code sections which used the specific phrase, "original contractor." Their only real relevance is to point out the fact that when the Legislature has sought to distinguish, "original contractors" from others, it has specifically used the phrase "original contractor." This was not done in Code of Civil Procedure Section 1190.1(h).

Respondent concludes his reply to Point II (Resp. Br. p. 10) by condemning appellant's attempt to read the word "general" into Code of Civil Procedure Section 1190.1(h), so as to make it read "any of the persons mentioned in sections 1181 and 1184.1, except the *general* contractor . . . (may file a stop notice)." Appellant must plead guilty. But what respondent seeks to do is to change the wording to read "Any of the persons . . . except *any original* contractor. . . ." Appellant submits that respondent's interpretation plays much faster and more loosely with the phraseology of the Legislature than does appellant's.

Of course, there is no authority in decided appellate cases for appellant's interpretation; nor is there any for respondent's. This question is one of first impression.

There was no reason for it to arise until the enactment of Code of Civil Procedure Section 1190.1(h) in 1951, because the earlier stop notice laws permitted filing stop notices only against owners—not against lending agencies. Any original contractor was in privity with the owner, could sue directly, and had no need or use for the remedy of “equitable garnishment” afforded by the stop notice procedure.

It is true, as respondent asserts, that the word “general” is not present as explicitly modifying “contractors” in Section 1181. Neither, however, is the word “original” present. An examination of the Code will reveal that when the Legislature wished to indicate “original contractor” they used that phrase. (Code Civ. Proc., Sec. 1193.1.) No indication is found of the use of the word “general” before contractor in any other code section pertaining to liens, and respondent submits that this is probably true because the Legislature considers the word “contractor” enough to import “general contractor,” at least where it is preceded by the article, “the”.

III.

The Phraseology of Code of Civil Procedure, Section 1190.1(h), Requires Sustaining Appellant’s Stop Notice Right.

In his Opening Brief, appellant pointed out that (1) the use of the word “the” before “contractor” indicated an intention to exclude only one contractor on a job, and (2) throughout Code of Civil Procedure Section 1190.1(h) the “contractor” was referred to in the singular and bracketed with the “owner” as to his rights and limitations. This is because “the contractor” and the “owner” are the persons normally entitled to receipt of the construction loan funds in the absence of a stop notice, and

is further indicative that when the Legislature used the words, "the contractor," it was talking about the general contractor.

In reply, respondent states that Code of Civil Procedure Section 1190.1 was derived from the old Sections 1183 and 1184. In *Pugh v. Moxley*, *supra*, the court indicated that the word contractor included an original contractor who did only a portion of the total work. As a matter of fact, the old Sections 1183 and 1184 were very comprehensive and contained much more of the mechanic's lien law than merely the stop notice provisions. *Pugh v. Moxley* had nothing to do with stop notices, but rather concerned distinguishing between original contractors and materialmen within the meaning of the provision, since repealed, requiring original contracts in an amount of \$1,000.00 or more to be written and recorded.

Inasmuch as respondent has quoted from the old stop notice provision of the Code as set forth in *Russ Lumber & Mill Company v. Garrettson* (1891), 87 Cal. 589, 25 Pac. 747, appellant urges the court to read that code section, or the portion set forth in the *Russ* case at page 593, which reads as follows:

"Any of the persons mentioned in Section 1183, except the contractor, may, at any time, give to the reputed owner a written notice that they have performed labor or furnished materials, or both, *to the contractor, or other person acting by authority of the reputed owner*, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount and value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. . . . Upon such notice being given, it shall be the *duty of the person*

who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may became due, to such contractor, or other person, to answer such claim and any lien that may be filed therefor for record under this chapter . . .” (Emphasis added.)

Perhaps this old phraseology more clearly sets forth the obvious intent of the stop notice section to effect an equitable garnishment or interception of funds due from the holder to the person in privity with the holder.

IV.

If There Be Ambiguity in the Phraseology of Code of Civil Procedure Section 1190.1(h), the Construction Loan Agreements Resolve Same.

Respondent states that any third party beneficiary rights which appellant may have would also be available to the others who contributed to the construction. This would be true, of course, if the others had pursued their rights; the fact that they did not cannot defeat appellant's right. See *Smith v. Anglo-California Trust Company* (1928), 205 Cal. 496, 505, 271 Pac. 898.

Again, respondent urges the rights of all general creditors on the basis of what some general creditors contributed to the construction. Again, such an argument is irrelevant and without merit.

Finally, respondent asserts that to give appellant any rights as a third party beneficiary would defeat the intent of the Legislature. There is certainly nothing in the Statute which warrants the conclusion that third party beneficiary contracts are not to be given effect.

V.

The Fact That "Original Contractors" Are Given More Time to File Liens Than Subcontractors and Materialmen Under Code of Civil Procedure Section 1190.1 Is Irrelevant to an Interpretation of the Word "Contractor" in Code of Civil Procedure Section 1191.1(h).

The logic of Respondent's Point VI has a Louis Carroll-like quality; it is difficult to grasp or analyze. In essence, respondent seems to state that (1) Code of Civil Procedure Section 1193.1 gives original contractors more time than subcontractors and materialmen within which to file liens; (2) this indicates an intent to include all original contractors within the terminology, "contractor"; and (3) that having had this preferred treatment, along with general creditors, all original contractors should be embraced within the words "the contractor," and excluded from the stop notice remedy of Code of Civil Procedure Section 1190.1(h).

(1) The above is not exactly true. Section 1193.1 permits subcontractors and materialmen to file *any time* after completing the performance *or* within 30 days after filing the notice of completion. Most of them complete performance well before the entire construction is completed so they will generally have more than 60 days, let alone more than 30 days, after they complete performance within which to file a lien. As soon as an original contractor has completed his performance, however, a notice of completion may be filed under Code of Civil Procedure Section 1193.1, so he will nearly always be limited to the 60-day period. The reason for the distinction in filing times is obvious, and has nothing to do with Section 1190.1(h).

A logical analysis of (2) above will show that the contrary contention is true. The Legislature did not refer to "the contractor" in Section 1193.1, but to "every original contractor." Rather than indicate that all original contractors are included in the term, "contractor" as respondent states, this indicates that if the Legislature meant "all original contractors" in Section 1190.1(h), it would have said so just as it did in Section 1193.1.

(3) above as the conclusion based on (1) and (2), must fall.

Conclusion.

The stop notice law, as a concomitant of the mechanic lien law, is to be construed liberally to effect its salutary purpose and not in conformity with groundless semantic quibbles. Therefore, the order and judgment appealed from should be reversed.

Respectfully submitted,

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Attorney for Appellant.

No. 16038

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOYD BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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No. 16038

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOYD BROWN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.

JURISDICTION.

The jurisdiction of this Court is probably invoked by reason of Section 2255 of Title 28, U. S. C., which provides for an appeal to this Court from the order denying the motion made in the District Court, and likewise, by reason of Rules 37 and 39 of the Federal Rules of Criminal Procedure, also as provided for in Section 1291 of Title 28, U. S. C. A. The appellee will later discuss what appears to be an absence of jurisdiction.

II.

PRELIMINARY STATEMENT.

The sentence on the retrial of appellant was had on April 19, 1954. The sentence was for a total of 40 years, 10 years on each of four counts, to run consecutively.

An appeal from such sentence was made to this Court and the conviction was affirmed on its merits (*Brown v. United States*, 222 F. 2d 293). There is no Clerk's Transcript; however, it is understood the entire file will be available to this Court for its further determinations.

In the month of February, 1958, appellant presented to the trial Court, namely, William C. Mathes, a document entitled "Motion for Correction of Sentence Memorandum." Judge William C. Mathes made his order of February 13, 1958, which reads as follows:

"ORDER.

"Inasmuch as the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief [28 U. S. C. Sec. 2255] the motion is hereby denied.

February 13, 1958

Wm. C. Mathes

United States District Judge."

The appellant applied for review to this Court and on June 23, 1958, this Court entered its order denying the relief then sought. Subsequent to such order, this Court, on September 30, 1958, set aside the aforementioned order and granted appellant's petition to proceed on the typewritten record and briefs.

Briefly summarized, the counts of which Brown was convicted upon the retrial, which conviction was affirmed as aforesaid, charged substantially the following:

Count Two charged that on March 4, 1953, appellant sold one ounce, 324 grains of heroin in violation of Title 21, U. S. C. A., Sec. 174.

Count Three charged that on March 13, 1953, appellant and Hollins sold one ounce, 440 grains of heroin in violation of Title 21, U. S. C. A., Sec. 174.

Count Four charged that on March 4, 1953, appellant received, concealed and facilitated the transportation of one ounce, 324 grains of heroin in violation of Title 21, U. S. C. A., Sec. 174.

Count Five charged that on March 13, 1953, appellant and Hollins received, concealed, and facilitated the transportation of one ounce, 440 grains of heroin in violation of Title 21, U. S. C. A., Sec. 174.

III.

THE STATUTE INVOLVED.

All of the aforementioned four counts were brought under one narcotic act, namely, 21 U. S. C., Section 174. This section was the statute as amended in 1951 and continued to be the statute that applied to the offenses charged, all of which occurred during the month of March, 1953. Title 21, U. S. C., Section 174, then provided as follows:

“Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or received, conceals, buys, sells, or in any manner facilitated the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than \$2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than \$2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than \$2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a

second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173 and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

“Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.”

IV.

QUESTIONS PRESENTED.

1. Whether consecutive sentences could properly be imposed on separate counts, one involving the sale of the heroin, the other involving the charge of receiving, concealing and facilitating the transportation of the same heroin? (In other words, Count Four pertains to the same heroin set forth in Count Two, and Count Five pertains to the same heroin set forth in Count Three.)
2. Whether or not the appellant, who concededly has not yet completed the service of two admitted valid sentences, may invoke jurisdiction to question consecutive sentences which he has not as yet commenced to serve?

V.

ARGUMENT.

The Consecutive Sentences Imposed Were All Valid.

It is to be observed that Section 174 of Title 21, U. S. C., provides that a second offender shall be imprisoned not less than five years nor more than ten years. Appellant Brown was concededly a second offender when herein sentenced. The same section provides for several violations. In other words, the sale of the narcotic, and the concealing or the facilitating the transportation are separate offenses despite the fact that they all grow out of the same transaction and occurred on the same date. This principle has been repeatedly sustained in sentences imposed under various of the narcotics statutes.

The most recent opinion of the Supreme Court in affirming the principles set forth in *Blockburger v. United States*, 284 U. S. 299, pertaining to sentences

under the narcotics statutes, among which reference was had to 21 U. S. C. Section 174, is that of *Gore v. United States*, 357 U. S. 386 (June 30, 1958). This case discussed the same contentions appellant here urges. The Court stated at page 389:

“The fact that an offender violates by a single transaction several regulatory controls devised by Congress as means for dealing with a social evil as deleterious as it is difficult to combat does not make the several different regulatory controls single and identic.”

The Court likewise said in the *Gore* opinion, page 388:

“We adhere to the decision in *Blockburger v. United States*, *supra*. The considerations advanced in support of the vigorous attack against it have left its justification undisturbed, nor have our later decisions generated counter currents.”

Appellant Brown urges several cases which do not concern themselves with narcotics in support of his contention that two of the imposed consecutive sentences should be vacated. These cases are *Bell v. United States*, 349 U. S. 81; *United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218, and *Prince v. United States*, 352 U. S. 322. In the *Gore* opinion all of the last three mentioned cases, had there likewise been urged. They are discussed and distinguished in the Supreme Court opinion; consequently, we shall not directly deal with them in this brief. It is our belief that the *Gore* opinion clearly distinguishes such cases.

The appellant, likewise, relies on additional cases not involving narcotic offenses. These we shall discuss at a later point.

It is understandable to the writer of this brief that a person may consider an injustice has been imposed upon him when he receives two sentences for what might normally appear to be one transaction. Such a transgressor may not appreciate the full import of Congress in trying to eliminate the nefarious narcotic traffic and may fail to realize that there are elements in one charge that are not present in another charge, although the same heroin is involved in both counts. This philosophy finds some support in the discussion contained in *Yancy v. United States*, 252 F. 2d 554 (C. A. 6, 1958), wherein such case a similar contention was urged but repudiated by the Sixth Circuit in, likewise, a narcotic offense, for, in quoting from Judge Bazelon's concurring opinion in *Gore v. United States*, 244 F. 2d at page 766, the Court noted as follows at page 556:

“‘If we were approaching afresh the question whether, in such a case, single or cumulative punishment is the legal course, I think we could not so easily conclude that the consecutive sentences here imposed are authorized. ‘It would be self-deceptive to claim that only one answer is possible to our problem. “* * * But the question is not one we are at liberty to approach afresh.’

“As there suggested, it may be that the ‘same evidence’ test, applicable to narcotics offenses under the rule of the Blockburger case, will some day be re-examined by the Supreme Court in the light of its decisions applying the ‘same transaction’ test to other criminal statutes.”

This problem has frequently been before this Court. One recent opinion of this Court, concerning the identical contention now urged, is *Logan v. United States*, 253 F. 2d 709 (C. A. 9, 1957), wherein two other opin-

ions of this Court are cited dealing with consecutive sentences which hold that the sale of heroin and its transportation constitute separate and distinct offenses.

The subject was again discussed and determined adversely to appellant's position in another narcotic case brought under 21 U. S. C., Section 174. In this Court's opinion of *Sherman v. United States*, 241 F. 2d 329 (C. A. 9, 1957), this Court stated on page 334:

"It is true that each of the three offenses were part of a general plan but each had its separate genesis and separate train of events leading to culmination. Without further comment on the cases cited by appellant in support of his single transaction theory we point out that the law is well established, that even if there be any substance to the single transaction rule it does not apply in the federal courts.

"The court in *Reynolds v. United States*, 6 Cir. 280 F. 1, 2, commented on the so-called 'single transaction' rule as follows:

" 'The sole contention of plaintiff in error made here (although stated in two forms) is that she has been twice punished for a single offense, invoking in support of that contention divers holdings of state courts under what is called the "same transaction" rule. This broad rule * * * does not prevail in the courts of the United States, wherein it is well settled that it is competent for Congress to create separate and distinct offenses growing out of the same transaction.' "

It is thus observed that this Court has given consideration to the so-called "single transaction" theory.

Other cases adverse to appellant's position are legion. To cite but a few, attention is invited to the following:

United States v. Brisbane, 239 F. 2d 859 (C. A. 3, 1956), which also involves 21 U. S. C., Section 174; and

Martinez v. United States, 220 F. 2d 740 (C. A. 5, 1955), likewise involving a conviction under 21 U. S. C., Section 174.

To similar effect, with respect to a holding and discussion of convictions had under 21 U. S. C., Section 174, see:

United States v. Lewis, 227 F. 2d 524 (C. A. 2, 1955), *cert. den.* 350 U. S. 974.

The first offender is not necessarily a novice in the drug traffic. As pointed out by Judge McAllister in *Everett v. United States*, 227 F. 2d 457, 459 (C. A. 6, 1955).

"... One who is convicted of a first offense for selling or dealings in narcotics is, often, an old hand at the game who has previously escaped arrest and conviction because he knows all the tricks. The purpose of the statute was not to give consideration to first offenders of the Narcotics law but to increase sentences for second and third offenders."

General Discussion.

The Boggs Act of 1951, applicable here (65 Stat. 767) alike other narcotic statutes is directed at increasing *minimum* sentences, not at mitigating any possible harsh results from multiple offenses.

The first section of the Act known as the Boggs Act (65 Stat. 767) separately amended Section 2(c) of the

Narcotic Drugs Import and Export Act. It made mandatory, for the first time, a *minimum* prison sentence of two years for the first offender, five years for the second offender, and ten years for the third offender, and also a fine of not to exceed \$2,000 for all offenders. It set the maximum terms for first offenders at five years, for second offenders at ten years, and for third offenders at 20 years.

Section 2 of the Act *separately* amended Section 2557(b)(1) of the Internal Revenue Code, placing in that section the mandatory minimums and the scale of maximums above set forth.

The Boggs Act (65 Stat. 767) did not expressly refer to—much less overrule—the long-established *Blockburger* holding as to separate offenses. Its entire structure left all definitions and separations of offenses substantially as before. Indeed, the separate amendment of both the Import Act and the revenue code is in itself a significant, even if tacit, recognition of the separateness of the substantive offenses.

It is to be recalled that appellant is a second offender. (See copy of judgment sentencing the appellant dated April 19, 1954, as contained in Appendix.)

Amendments to the narcotics laws subsequent to the *Blockburger* decision have merely increased the penalties, and have not changed the character of the offenses proscribed. The fact that Congress prescribed a heavier sentence for subsequent offenders certainly does not show that it considered that the initial offense would be unitary, no matter how many statutes were violated. The character of the offenses as separate depends on *what* is proscribed; the increased penalty depends on *when* the offenses are committed, *i.e.*, whether they are committed

subsequent to a prior conviction or convictions. Even if the first conviction resulted from six clearly separate offenses—*e.g.*, six widely separated acts of sale—it would be a first conviction for recidivist penalty purposes. Hence, the provision for heavier penalties for subsequent violators—persons who had previously been punished or given an opportunity to reform—does not bear on the separate character of the offenses as such.

In arguing that, if the offenses are not separate as a matter of statutory construction, they must be held unitary to avoid violation of the constitutional prohibition against double jeopardy, appellant is admittedly asking this Court to reconsider a long line of its decisions to the effect that there is no violation of the double jeopardy clause if the offenses as such are different, no matter how closely related in actual fact.

Almost any criminal statute dealing with a particular field has an essentially “unitary” purpose, but that does not prevent separate offenses from being enacted by Congress. The prohibition statute involved in *Albrecht v. United States*, 273 U. S. 1 (an opinion by Justice Brandeis, holding possession and sale separate offenses) was aimed at preventing the sales of liquor except through recognized channels in a field in which Congress had complete authority regardless of any revenue foundation. The bribery statute involved in *Burton v. United States*, 202 U. S. 344 (involving agreement to take a bribe, and bribery) was aimed at preventing the taking of bribes. The counterfeit statute involved in *United States v. Michener*, 331 U. S. 789 (making a plate for counterfeiting, and possessing the plate), was aimed at preventing the circulation of counterfeit, another area in which Congress has full power over the field. As those decisions show, this does not mean that

Congress may or does impose only one punishment for all the various acts that can be done to defeat the single general Congressional purpose. Certainly, for example, Congress had the right to, and did, consider the making of counterfeit one evil, and the passing of counterfeit (whether by the maker or by someone else) a separate act and a separate evil punishable as a separate offense. The government is substantially and separately injured when each of its requirements directed toward enforcement of the desired end is violated. This is the situation here.

Appellant's entire argument, upon analysis, resolves itself into a contention that, on the particular facts of his case, the sentence is unfair. That is not, we submit, a basis for overturning long-established principles of statutory interpretation in the field of criminal law, or for construing anew the constitutional doctrine of double jeopardy.

Brief Discussion of Cases Cited by Appellant.

We have heretofore referred to the late Supreme Court *Gore* opinion wherein the Court specifically discussed and distinguished several of the cases appellant relies upon. We shall now briefly refer to the other remaining cases that appellant has cited.

Appellant cites *Cosgrove v. United States*, 224 F. 2d 146 (C. A. 9, 1954). This case pertains to a charge of preparation and presentation of false tax returns. This is a case decided upon *res judicata*. The Court concluded that an acquittal on charges that the defendants had conspired to defraud the United States was *res judicata* to later charges of aiding and assisting in the preparation and presentation of such returns. This case is obviously not parallel to the instant charges.

Appellant also relies upon *Scalfon v. United States*, 332 U. S. 575 (1948). This opinion likewise deals with the doctrine of *res judicata*. The Court held that under the unique circumstances of the case an acquittal on charges to defraud the United States was *res judicata* of a later conviction for aiding and abetting the uttering and publishing of the same false invoices introduced at the conspiracy trial. The Supreme Court in *Scalfon* has, in practical effect, made the factual closeness of particular offenses a significant factor, not by upsetting long-established rules of double jeopardy (which indeed that decision reaffirmed), but by liberalized interpretation of the principle of *res judicata*.

Another case cited by appellant is *Yawn v. United States*, 244 F. 2d 235 (C. A. 5, 1957). This case holds that when the defendant was acquitted of a substantive count of the unlawful possession of a still, a conspiracy to violate Internal Revenue laws by unlawful possessing and controlling distilling apparatus and distilled spirits, and engaging in the business of a distiller without paying taxes, was barred, in that the doctrine of *res judicata* operates to conclude those matters in issue which the verdict determined although the offenses may be different, or, as said at page 237:

“ . . . This Court has phrased it, ‘A question or issue determined by a prior acquittal may not be relitigated in a criminal proceeding against the same person.’ ”

The final case cited by appellant is *Simon v. United States*, 225 F. 2d 260 (C. A. 3, 1955), which likewise deals with a previous acquittal. It concerned itself with a prosecution for possession of stolen turkeys by a defendant who had been acquitted in a previous trial of a charge of receiving stolen turkeys. A relitigation of decided facts.

VI.

APPELLANT'S MOTION TO VACATE
SENTENCES WAS PREMATURE.

At the offset we indicated that there was some question as to whether or not this Court had jurisdiction. This observation is had inasmuch as appellant apparently concedes that the sentences had on Counts Two and Three, the ones charging the *sale* of the heroin, are valid. If this be true, appellant has not concluded the service of such sentences and should not at this time invoke the relief provided for by Title 28, U. S. C., Section 2255.

A recent opinion of this Court dealing with this proposition is that of *Miller v. United States*, 256 F. 2d 501 (C. A. 9, 1958). This Court there held that relief under Section 2255 is limited to release from present detention and is not available to test the legality of threatened detention.

As we understand appellant's motion made to the District Court, no contention was there made that the sentences he is now serving are invalid.

The above principle seems to be that universally followed by this Circuit and by other authorities.

See also:

Williams v. United States, 236 F. 2d 894 (C. A. 9, 1956);

Toliver v. United States, 249 F. 2d 804 (C. A. 9, 1957);

United States v. Young, 93 Fed. Supp. 76 (W. D. Wash., N. D.—1950);

United States v. Greco, 141 Fed. Supp. 829 (U. S. D. C., M. D. Pa.—1956).

Conclusion.

It is therefore respectfully submitted that the relief sought by the appellant should be denied.

Respectfully submitted,

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ROBERT JOHN JENSEN,
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Chief, Criminal Division,*

NORMAN W. NEUKOM,
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Chief Trial Attorney,
Attorneys for Appellee.*



APPENDIX.

United States District Court for the Southern District of California, Central Division.

United States of America v. James Boyd Brown. No. 22940-Cr. Indictment [5 Counts—for violation of 21 U. S. C. §174].

JUDGMENT AND COMMITMENT.

On this 19th day of April, 1954 came the attorney for the government and the defendant appeared in person and with his attorney, Walter L. Gordon, Jr., Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offenses of having on or about March 4, 1953 and on or about March 13, 1953, in Los Angeles County, California, after importation, knowingly and unlawfully sold to Frank Stafford a certain narcotic drug, namely heroin, and of having knowingly and unlawfully received, concealed and facilitated the transportation and concealment, after importation, of a certain narcotic drug, namely heroin, all in violation of 21 U. S. C. § 174, as charged in Counts Two, THREE, FOUR and FIVE of the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court;

IT IS ADJUDGED that the defendant is guilty as charged and convicted. And the United States Attorney having heretofore filed an information alleging a prior conviction of the defendant of an offense in violation of 21 U. S. C. § 174; and the defendant having admitted and affirmed in open court the commission by him of such prior offense

under 21 U. S. C. § 174 and his conviction therefor on October 21, 1949 in case No. 20857 in this court;

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten years for the second offense in violation of 21 U. S. C. § 174 charged in Count Two of the indictment, and shall pay to the United States of America a fine of \$2,000; and shall be further imprisoned for a like term of ten years for the second offense in violation of 21 U. S. C. § 174 charged in Count THREE of the indictment, and shall pay to the United States of America a fine of \$2,000; and shall be further imprisoned for a like term of ten years for the second offense in violation of 21 U. S. C. § 174 charged in Count FOUR of the indictment, and shall pay to the United States of America a fine of \$2,000; and shall be further imprisoned for a like term of ten years for the second offense in violation of 21 U. S. C. § 174 charged in Count FIVE of the indictment, and shall pay to the United States of America a fine of \$2,000;

IT IS FURTHER ADJUDGED that the four ten-year terms of imprisonment imposed for the offenses charged in Counts TWO, THREE, FOUR and FIVE of the indictment shall commence and run CONSECUTIVELY to each other, so that the defendant shall be committed to the custody of the Attorney General for imprisonment for a total period of forty years, and shall pay to the United States of America the fines totaling \$8,000 herein imposed, and shall be further imprisoned until all said fines are paid or until he is otherwise discharged as provided by law;

IT IS FURTHER ADJUDGED that the defendant is hereby committed to the custody of the United States Marshal,

subject to any prior custody of the authorities of the State of California, to serve the four CONSECUTIVE ten-year sentences herein imposed.

IT IS FURTHER ADJUDGED that Count ONE of the indictment be and is hereby dismissed on motion of the United States Attorney.

IT IS FURTHER ADJUDGED that the bail of the defendant be exonerated.

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Filed April 19, 1954.

WM. C. MATHES

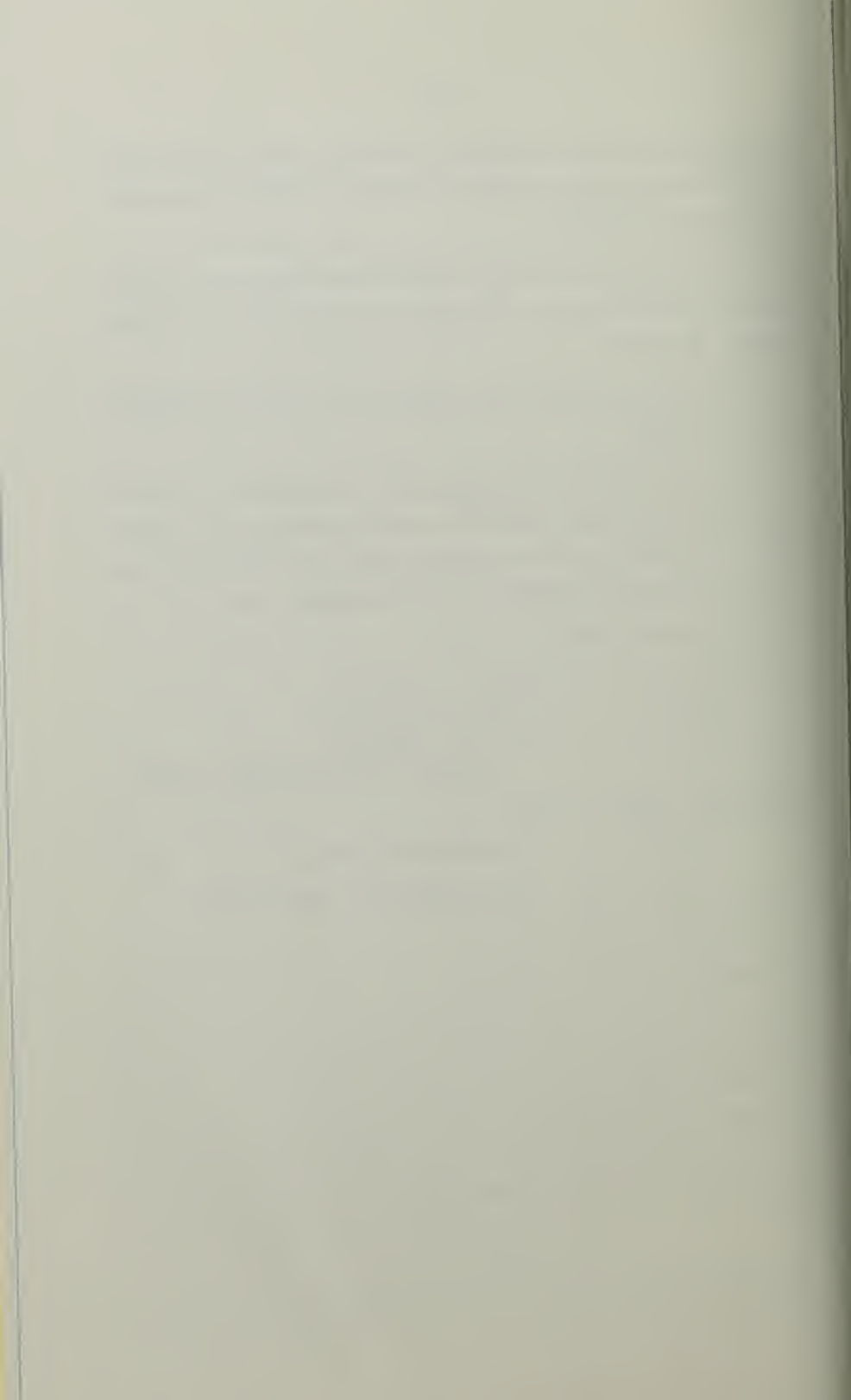
Wm. C. Mathes

United States District Judge

Edmund L. Smith, Clerk

By P. D. HOOSER

P. D. HOOSER, *Deputy Clerk*



In the United States Court of Appeals
for the Ninth Circuit

HERALD A. O'NEILL and G. EVELYN O'NEILL,
his wife, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the
Tax Court of the United States

BRIEF FOR THE RESPONDENT

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Assistant Attorney General,

LEE A. JACKSON,
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FILED

APR 16 1959

PAUL P. O'BRIEN, CLERK



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16039

HERALD A. O'NEILL and G. EVELYN O'NEILL,
his wife, PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 106-130)¹ are not officially reported.

JURISDICTION

This petition for review (R. 131-135) involves deficiencies in federal income taxes for the calendar years 1951 and 1952 in the respective amounts of

¹ Record references are to the pages of the typewritten transcript of record filed by the taxpayer.

\$1,154.78 and \$10,635.90, and an addition to tax under Section 294(d)(1)(A) of the 1939 Code for the year 1952 in the amount of \$903.60 (R. 131-132). A notice of deficiency was mailed to the taxpayers on February 25, 1955. (R. 8-12, 14.) On May 23, 1955, the taxpayers filed a petition for redetermination of those deficiencies (R. 1, 3-7) under the provisions of Section 272(a) of the 1939 Code. On February 20, 1957, an amended petition was filed. (R. 2, 14-21.) The decision of the Tax Court was entered on January 13, 1958. (R. 2, 130-131.) The case is brought to this Court by a petition for review filed by the taxpayer² on March 21, 1958. (R. 2, 131-135.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court's finding, that the taxpayer is not entitled to a loss deduction for the year 1952 under Section 23(e) of the 1939 Code because he failed to carry his burden of proving that a loss was realized in that year as a result of transactions in connection with the Eagle Timber and Mill Company, is clearly erroneous.

2. Whether the Tax Court's finding, that the taxpayer's loss resulting from a transaction in which he was an escrow agent was not incurred in his trade or business, is clearly erroneous.

² Since G. Evelyn O'Neill is involved solely because of the filing of joint tax returns for the taxable years (R. 107-108), her husband hereinafter will be referred to, individually, as the taxpayer.

3. Whether the Tax Court's finding, that the taxpayer failed to prove reasonable cause for his failure to file a declaration of estimated tax in the year 1952, is not clearly erroneous with the result that the taxpayer is liable for the addition to tax imposed by Section 294(d)(1)(A) of the 1939 Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the statutes and Regulations involved are printed in the Appendix, *infra*.

STATEMENT

The facts as found by the Tax Court (R. 107-119) may be summarized as follows:

The taxpayer married Evelyn, his second wife, on August 23, 1951, and they reside in Seattle, Washington. They filed joint income tax returns for the years 1951 and 1952 with the District Director of Internal Revenue at Tacoma, Washington. (R. 107-108.)

The taxpayer married his first wife, Phoebe T. O'Neill, on July 6, 1927, and was divorced from her on August 20, 1951. (R. 108.)

The taxpayer's trade or business during the taxable years and all related periods was that of an attorney. (R. 108.)

On September 4, 1946, the taxpayer purchased certain timber property, hereinafter referred to as the Timber Property, from H. H. and Mildred Longenecker. The latter parties executed on October 24, 1946, a statutory warranty deed and bill of sale which named the Eagle Timber and Mill Company

(hereinafter referred to as Eagle Timber) as grantee. The statutory warranty deed and bill of sale was filed with the Auditor of Kings County, Washington, on January 6, 1947. The stated consideration for the conveyance was \$10. (R. 108.)

On September 9, 1946, the taxpayer executed an option to purchase certain portable sawmill machinery, hereinafter referred to as the Sawmill, from the Webster-Brinkley Company for \$18,500. The Sawmill was at that time located on the Timber Property. The taxpayer extended the option eight times, and finally, on October 18, 1948, completed the purchase. He transferred the Sawmill to Eagle Timber prior to February 3, 1947. (R. 109.)

Eagle Timber was incorporated as a Washington corporation on October 22, 1946. Its articles of incorporation were filed with the Secretary of the State of Washington at Olympia, Washington. The incorporators were the taxpayer, his former wife Phoebe, and Tim Healy. The purpose of the corporation was to engage in a general logging, milling, plywood, timber, and lumber business. On February 18, 1947, articles of incorporation also were filed with the Auditor of King County. Filing fees were paid to the State of Washington and King County. (R. 109.)

On December 27, 1946, Eagle Timber executed a promissory note secured by a mortgage on the Timber Property in favor of C. F. Dally, in the amount of \$24,908.49, which amount included a note given to Dally by H. H. Longenecker for \$12,500, which note was secured by mortgages upon the Timber Property.

The taxpayer also executed a written guarantee at that time in which he agreed to protect personally and keep unencumbered the timber, and agreed that the corporation would properly account for the stumpage due the mortgagee. On May 4, 1948, Dally assigned the mortgage to the Seattle-First National Bank. (R. 109-110.)

On February 3, 1947, Eagle Timber executed a real estate and chattel mortgage in favor of Herbert D. Norris as security for a promissory note in the amount of \$25,000. The mortgage security was the Timber Property and the Sawmill. (R. 110.) The mortgage provided that (R. 110)—

[the] Mortgagor is the owner of said property, has good right and authority to mortgage the same, will defend the title to said property unto Mortgagee, except as stated herein, successors and assigns, against all claims whatsoever, and will provide Mortgagee promptly, and in no event later than ten (10) days after date hereof, or upon Mortgagee's demand, with all the documents, proofs and instruments governing title to said property, which any public authority or Mortgagee may request.

Norris came into the Eagle Timber venture at the same time, paying the taxpayer \$10,000. On May 12, 1950, the taxpayer agreed to purchase all the right, title, and interest of every kind and character, of Norris, relating to the business of Eagle Timber, for \$16,000, and on or before December 31, 1952, paid \$2,000 on account of the purchase price thereof. (R. 110-111.)

On July 24, 1948, Eagle Timber, as vendor, agreed to sell the Timber Property and the Sawmill to Sterling Timber and Lumber Company for \$90,000, payable in installments. This transaction was never completed but was abandoned by the purchaser. (R. 111.)

In 1948 Eagle Timber was a defendant in an action commenced by the Buda Engine & Equipment Company, Inc., in the Superior Court of the State of Washington for King County. (R. 111.)

During the years 1946 through 1949, \$20,556.60 was paid from community funds of the taxpayer and his then wife, Phoebe, in connection with the business of Eagle Timber. This amount included \$18,500 paid to acquire the Sawmill from the Webster-Brinkley Company. (R. 111.)

On June 12, 1950, the taxpayer executed an assignment of interest in a fund on deposit with the Circuit Court of the State of Oregon for Douglas County to Seattle-First National Bank in the amount of \$12,500, in consideration of the assignment and transfer by such bank of its interest as mortgagee in the timber standing and being on the Timber Property. By stipulation of the parties under date of November 14, 1951, there was distributed and paid the sum of \$11,083.34 to the bank in full payment of the assignment. (R. 111-112.)

On July 1, 1950, Eagle Timber was dissolved by operation of law for failure to pay its annual corporate license fees for a period of three years. Eagle Timber has had no legal corporate existence in the State of Washington since that date. (R. 112.)

On September 26, 1951, the taxpayer delivered in escrow a deed executed by Eagle Timber to the Timber Property. This transaction was an attempt to sell the timber for \$15,000 net. A title report by the Washington Title Insurance Company, which accompanied the deed, recited that title to the Timber Property was vested in the dissolved corporation. The broker who attempted to sell the Timber Property understood that he was dealing with a representative of the corporation. (R. 112.)

The taxpayer entered into negotiations with the H & L Timber Company with reference to sale of the timber on the Timber Property. On May 28, 1952, H & L Timber Company offered the taxpayer \$11,500 for the timber, but the sale was never closed. (R. 112.)

On August 12, 1952, the taxpayer executed a bill of sale for the Sawmill located on the Timber Property in favor of J. A. Stafne for \$12,500. Stafne paid the taxpayer with a note, secured by a mortgage on the Sawmill. Stafne intended to ship the Sawmill to the Philippine Islands in connection with a transaction with the Amer-Phil Lumber & Veneer Company, but it was agreed that it would not be shipped until the \$12,500 purchase price had been paid. Stafne dismantled the Sawmill and shipped it to Seattle where it was stored awaiting shipment to the Philippines. Stafne never shipped the Sawmill to the Philippines, but subsequently went into business in Canada, and desired to use it in a corporation there. The security laws of British Columbia, however, required that the Sawmill be free and

clear of all encumbrances when transferred to the Canadian corporation. The taxpayer, therefore, released his mortgage on the Sawmill and took in lieu thereof as security Stafne's stock in the Portland Canal Development Company, Ltd., the company to which Stafne was going to transfer the Sawmill. The value of such stock was in excess of \$12,500 at the time of the exchange. At the time of the hearing of this case Stafne still owed the taxpayer the full \$12,500 sale price of the Sawmill. (R. 113.)

In November and December of 1952 the taxpayer negotiated with one Ward for the sale of the timber on the Timber Property. Ward offered the taxpayer \$2,000 for the timber, which offer the taxpayer tentatively accepted. Ward gave the taxpayer a check for \$500 on December 4, 1952, as earnest money, which check the taxpayer promised to hold until the spring. At that time Ward looked at the timber again and decided not to go forward with the purchase. The taxpayer never cashed the \$500 check. (R. 113-114.)

On his income tax return for 1952 the taxpayer claimed a business bad debt loss of \$33,639.84, as a result of his alleged sale to Ward of the timber on the Timber Property for \$2,000 and his alleged sale to Stafne of the Sawmill for \$12,500. (R. 114.) The computation was shown as follows (R. 114):

Bad debt loss—

Total loans to Eagle Timber and Mill Company	\$58,139.84
Less: Amount reimbursed.....	10,000.00
Balance due	<u>\$48,139.84</u>
Less: Amount recovered through foreclosure sale in 1952.....	14,500.00
Bad debt loss.....	<u><u>\$33,639.84</u></u>

During the years from 1946 to 1951 taxpayer advanced money to Eagle Timber and Mill Company. The Company went broke and during 1952 taxpayer recovered \$14,500.00 through sale of the company's assets.

In 1953 the taxpayer wrote off the \$2,000 that he had failed to collect from Ward as a result of the alleged sale in 1952 of the timber on the Timber Property. The taxpayer stopped paying taxes on the Timber Property in 1953. (R. 115.)

There was never filed in the office of the auditor of the county in which Eagle Timber had its registered office an affidavit signed by a majority of the board of directors stating that the amount of paid-in capital with which it would commence business, as stated in the articles of incorporation, had been fully paid. (R. 115.)

Eagle Timber never filed any reports with the office of the auditor of the county in which it had its registered office or in the office of the Secretary of State, stating the total number of shares allotted and whether they had a par value or no par value, stating the consideration received for the shares allotted, or stating the valuation put upon the consid-

eration other than cash received in payment of the shares allotted. (R. 115.)

There were never any meetings of the shareholders of Eagle Timber held, as there were never any formal stockholders. No stock certificates were ever issued by Eagle Timber. (R. 115-116.)

Eagle Timber never filed with the auditor of the county in which it had its registered office any statement containing a list of all its directors and officers and their respective titles of office, names and addresses, and the term of office for which they had been chosen, as there were never any officers or directors formally elected. (R. 116.)

Eagle Timber never maintained any minute books or other books of records. (R. 116.)

The agreement of settlement between the taxpayer and his former wife, Phoebe, executed at the time of their divorce in 1951, did not make any specific reference to the interest of the marital community in Eagle Timber or its assets. (R. 116.) However, the agreement provided, in paragraphs 11 and 12, as follows (R. 116):

11. The wife does hereby assign, convey and transfer to the husband, all of her right, title and interest in and to all other life insurance policies heretofore issued upon the life of the husband, and his personal effects and office furniture and equipment and business accounts receivable.

12. The husband does hereby transfer, assign, convey, deed and release to the wife, all of his right, title and interest in and to all other property and assets of every kind and character,

real, personal or mixed and wheresoever situated.

The taxpayer was the attorney for the Lucky Music Company of America, a Nevada corporation (hereinafter referred to as Lucky Music). Lucky Music was engaged in the manufacture of machines which were combination slot machines and phonographs. The machines were designed in that manner so that they might be used in states where slot machines were illegal. During 1949 Ray Fezzler, Frank Magrini, and Leo Lamb entered into an agreement to purchase 25 of the above-mentioned machines for \$12,500. Under the terms of the agreement the purchase price of \$12,500 was to be paid to the taxpayer as an escrow agent, and he in turn was to pay it over to Lucky Music as the machines were constructed. The machines were completed and the taxpayer paid the escrow funds to Lucky Music. Fezzler, Magrini and Lamb, however, did not want the machines delivered until after an election in Tacoma. Delivery was therefore delayed, and meantime Lucky Music's officers took the machines out of the area in an attempt to promote them elsewhere. The officers never returned with the machines. (R. 116-117.)

Fezzler, Magrini, and Lamb then demanded that the taxpayer refund the \$12,500. On April 19, 1950, the taxpayer executed an assignment of interest in a fund on deposit with the Circuit Court of the State of Oregon for Douglas County to a trustee of the above-mentioned individuals in the amount of \$12,500. The sum of money found to be distributa-

ble and payable to the taxpayer was determined in the court proceeding on December 30, 1950; however, it was retained by the clerk of the court pending the determination, settlement, and adjudication of the rights of any assignees of such funds pursuant to assignments thereof by the taxpayer. On November 21, 1951, pursuant to a stipulation of the parties, there was distributed and paid by order of the court, the sum of \$11,083.34 in full payment and settlement of the assignment and the demands and claims against the taxpayer, as escrow agent, of the \$12,500. (R. 117-118.)

The taxpayer never recovered any amount of the \$12,500 from Lucky Music, either prior to November 21, 1951, or subsequent thereto. (R. 118.)

The Tax Court found that Eagle Timber was a separate taxable entity during the period October 22, 1946, through July 1, 1950; that the transfers of the Timber Property and the Sawmill by the taxpayer to Eagle Timber constituted contributions to capital in that corporation (R. 118); that the taxpayer failed to prove that he realized a loss in 1952 as a result of the transactions concerning Eagle Timber (R. 125); and that the loss sustained by the taxpayer as a result of the transaction in which he acted as an escrow agent was personal in nature and was not incurred in his trade or business (R. 118-119). Accordingly, that court denied the taxpayer any loss deductions as a result of the transactions in issue. (R. 119-128.)

The Tax Court also found that the taxpayer's fail-

ure to file a declaration of estimated tax for 1952³ was not due to reasonable cause (R. 119), and hence affirmed the Commissioner's assertion of an addition to tax for that year (R. 128-129).

SUMMARY OF ARGUMENT

1. The taxpayer was the alleged owner of a corporation known as Eagle Timber and Mill Company. In 1950 Eagle Timber was dissolved and the taxpayer as alleged sole owner of the corporation received in liquidation all of its properties, which consisted of timber and a saw mill. The taxpayer alleges that in 1952 he sold the property so received and erroneously concludes that, since he received as a result of the alleged sales less than the amount of money he invested in the corporation, he sustained a loss in that year. He further mistakenly contends that his loss was deductible in full under Section 23(e)(1) or (2) of the 1939 Code as a business loss or as a loss sustained in a transaction entered into for profit, respectively.

Although, as the Tax Court found, the taxpayer did not prove that he realized a loss in 1952, it is necessary to first consider the nature of the loss if one were realized in that year—that is, would it be a capital loss subject to the limitations contained in the capital loss provisions of the Revenue Code, or would it be an ordinary loss deductible in full? The resolution of those questions will fix the relationship for tax purposes between the taxpayer and Eagle

³ The year in question is misstated in the finding of the court as 1950. (R. 119.)

Timber and is essential to the determination of the basic question, which is whether the taxpayer proved by a preponderance of the evidence that he realized a loss in the taxable year 1952. It is, of course, well settled that an investment in a corporation constitutes a capital asset in the hands of a taxpayer who is not in the business of dealing in corporate shares of enterprises, and that any loss as a result thereof is deductible *only* as a capital loss. The taxpayer was not in business as a dealer in corporate shares or enterprises and was not otherwise in a business to which the alleged loss could be related; hence, he argues that the corporate entity should be ignored and that its business or venture should be considered his personal business or venture in which it is contended the loss was incurred. This argument has no merit.

It is well settled that a corporation tax-wise is a separate and distinct entity from the individual or individuals who own it and that the individual owner cannot appropriate the corporate business or activities unto himself merely to realize tax benefits. There is one exception to this rule which is that a corporation may be disregarded *only* where (1) the purpose for its creation was not a business purpose, *and* (2) its creation was not followed by any business activity. Eagle Timber was incorporated in the State of Washington on October 16, 1946, and existed as a corporate entity under local law until July 1, 1950, when it was dissolved. The purpose for its creation as stated in its articles was to engage in the general logging, milling, and timber bus-

iness. Subsequent to incorporation Eagle Timber, in its corporate name, entered into a logging contract, and executed deeds, mortgages and notes. Since, therefore, there was a legitimate business purpose for the creation of the corporation it may not be disregarded. Further, the record, as outlined, shows that there were business transactions executed in the corporate name, and for this additional reason the entity cannot be disregarded. Accordingly, the Tax Court's finding that Eagle Timber must be recognized for tax purposes is clearly correct.

Since Eagle Timber was a corporate entity separate, for tax purposes, from the taxpayer, the taxpayer's investment therein constituted a capital asset and any loss as a result of that investment is not deductible in full but is subject to the limitations contained in the capital loss provision of the Code. Moreover, when that corporation was dissolved in 1950 the taxpayer, for tax purposes, is considered as having received its properties in *exchange* for his investment and as realizing a gain or loss *at that time* measured by the difference between the basis of his investment and the fair market value of the property distributed to him. Hence, the taxpayer's basis for the purpose of determining gain or loss on a subsequent disposition of the properties is their fair market value at the time they were acquired by him, which was in 1950. This brings us to the basic question under this point, which is, whether the taxpayer carried his burden of proving that he realized a loss in 1952 when he allegedly sold the properties

he had received in liquidation and which were capital assets in his hands.

The question whether a taxpayer realized a loss in a particular year is one of pure fact upon which the taxpayer has the burden of proof. And, it is well settled that without proof of the tax basis of property it cannot be determined, upon a sale of the property, whether or not gain or loss has been realized. The trial court found as a fact that the taxpayer did not carry his burden of showing that he realized a loss since he did not prove his basis in the properties that he had received in 1950 as a result of the liquidation of Eagle Timber and which he allegedly sold in 1952. The taxpayer introduced no evidence with respect to the fair market value of the properties in 1950, and, therefore, the Tax Court's finding is fully supported by the record and is not clearly erroneous.

For the foregoing reasons, and for the additional reasons that the taxpayer did not prove that the alleged sale in 1952 of the timber property constituted a closed transaction in that year, that the alleged loss on the sale of the sawmill was incurred in a transaction entered into for profit, and that he fully owned the properties upon which his loss is based, the taxpayer is not entitled to any loss deduction for the year 1952 as a result of his investment in Eagle Timber.

2. The taxpayer also claims that he sustained a loss in 1951, which he alleges was incurred in his business as a practicing attorney, and therefore that he is entitled to a deduction under Section 23(e) (1)

of the 1939 Code. The Tax Court found as a fact, however, that the claimed loss was essentially a personal one, sustained by the taxpayer solely to protect his person from the threats of racketeers to whom the payments were made, and denied the deduction. Since the loss was in its nature personal, Section 24(a)(1) of the 1939 Code forbids its deduction "in any case". The question whether a loss or expense is personal is one of fact and the record here fully warrants the Tax Court's finding, which is not clearly erroneous. For the foregoing reason, as well as others fully discussed in Point II of our argument, the taxpayer is not entitled to the claimed deduction.

3. Although the taxpayer was required to file a declaration of estimated tax for the year 1952 he failed to do so. Section 294(d)(1)(A) of the 1939 Code exacts an addition to tax from any taxpayer who fails to file a declaration on time. The addition to tax is mandatory "unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect". The Commissioner was not satisfied that the taxpayer's failure to file a declaration for 1952 at any time, late or otherwise, was due to reasonable cause. The Tax Court found as a fact that the taxpayer's failure to file a declaration was not due to reasonable cause and, in accordance with the statutory mandate, decided that the taxpayer was liable for the addition to tax. The question here is one of fact and the burden of proof is upon the taxpayer; since the record fully supports the Tax Court's finding, the taxpayer's contention that it is clearly erroneous is without merit.

ARGUMENT

I

The Tax Court's Finding That the Taxpayer Did Not Carry His Burden of Proving That He Realized a Loss In the Taxable Year 1952 As a Result of Transactions In Connection With Eagle Timber and Mill Company Is Fully Supported By the Record and Not Clearly Erroneous

A. Introduction

Eagle Timber was incorporated as a Washington corporation on October 22, 1946. (R. 109.) On October 24, 1946, the taxpayer contributed timber property to Eagle Timber and prior to February 3, 1947, he contributed a sawmill to that corporation. (R. 108-109.) In May, 1950, Herbert D. Norris sold his interest in Eagle Timber to the taxpayer and the taxpayer assumes that that resulted in his complete ownership of the corporation. (R. 98, 110-111; Br. 61-62.) The taxpayer argues that his total investment in Eagle Timber was as follows (Br. 61):

Amounts paid for properties transferred to Eagle Timber (see R. 111).....	\$20,556.60
Payment to Herbert D. Norris for his interest in Eagle Timber.....	2,000.00
Paid to clear Eagle Timber's property from liens	11,083.34
Total.....	<u>\$33,639.94</u>

On July 1, 1950, Eagle Timber was dissolved by operation of law for failure to pay license fees. (R. 112.) The taxpayer contends (Br. 61) that in 1952 he sold the property that he had previously received upon the dissolution of the corporation and recov-

ered as a result thereof \$14,500; accordingly, he argues that he suffered an ordinary loss of \$19,-139.94, the difference between the amount of his investment and his recovery upon the sale of the properties mentioned.

In the Tax Court the taxpayer argued that his loss constituted a business bad debt loss, deductible in full under Section 23(k)(1) of the 1939 Code (Appendix, *infra*), or that the loss was incurred in a transaction entered into for profit, deductible in full as an ordinary loss under Section 23(e)(2) (Appendix, *infra*). (R. 107.) The Tax Court found as a fact (R. 118, 123-124) that the taxpayer's outlays to and on behalf of Eagle Timber did not constitute debts but were investments; that is, that they constituted contributions to the capital of Eagle Timber. In this Court the taxpayer does not contend that that finding is clearly erroneous, since the record fully supports it, and he agrees that the advances were *investments* in the venture. (Brief *in toto*.) The taxpayer's position is apparently that Eagle Timber should not be recognized as a taxable entity distinct from himself, and therefore its business should be considered his business and any loss as a result of the venture should be allowed in full, either as a business loss under Section 23(e)(1) or as a loss from a transaction entered into for profit under Section 23(e)(2). As we shall show in the following discussion, the taxpayer's arguments are without merit.

It should be noted here that if the Tax Court's findings (R. 122-124), that Eagle Timber must be

recognized as a taxable entity for tax purposes and that the taxpayer's advances constituted capital contributions to the corporation, are correct then the taxpayer is not entitled to an ordinary loss deduction in any event. The loss would not be a business loss under Section 23(e)(1) because a corporation, tax-wise, is to be treated as a separate and distinct entity from the individual who owns it, and its business cannot be appropriated by the owner unto himself. See subpoint B, *infra*.⁴ Moreover, the fact that

⁴ The only instances in which a taxpayer who owns a corporation recognized as a tax entity can take a business loss deduction for his financing of the corporation, either by way of *loans* or contributions to capital, are where (1) he is in the business of loaning money, or (2) he is in the business of promoting, financing, and managing business enterprises. *Holtz v. Commissioner*, 256 F.2d 865, 870 (C.A. 9th); *Skarda v. Commissioner*, 250 F. 2d 429, 435 (C.A. 10th); *Wheeler v. Commissioner*, 241 F. 2d 883, 884 (C.A. 2d); *Hickerson v. Commissioner*, 229 F. 2d 631, 634 (C.A. 2d); *Berwind v. Commissioner*, 20 T.C. 808, 815, affirmed *per curiam*, 211 F. 2d 575 (C.A. 3d). The taxpayer did *not* contend before the Tax Court, nor does he contend here, that he was in any of these businesses in the year of the alleged losses, and the record clearly would not support such contention. The record merely shows that since 1934 the taxpayer was associated with several corporations merely as an employee, liquidating trustee, or officer, and that he invested in several corporations as a stockholder. (R. 47-49.) It is well settled that such activities are not sufficient to create separate businesses for a taxpayer so that his loss from an investment in a corporation may be considered a business loss. Indeed, the taxpayer on his tax returns for 1951 and 1952 stated that his only business was that of an attorney. (Exs. 1-A, P.) The courts have uniformly disallowed business losses in cases parallel to this one but involving more extensive activities than were here involved. *Dalton v. Bowers*, 287 U.S. 404; *Holtz v. Commissioner*, *supra*; *Koch v.*

a loss is incurred in an alleged transaction entered into for profit under Section 23(e)(2) does not of itself permit a deduction of the loss in full. An individual taxpayer in order to deduct losses must bring his transaction within one of the provisions of Section 23(e); however, the amount of the loss allowed as a deduction is limited by other subsections of Section 23. Since the Tax Court found (R. 124) that the advances were investments in Eagle Timber, and the investments were not held for sale to customers in the ordinary course of a trade or business and were not inventory property, they constituted capital assets, and upon liquidation of the corporation any loss must be taken only as a capital loss as a result of a sale or exchange of a capital asset. Sections 23(g), 115(c), and 117 of the 1939 Code (Appendix, *infra*); *Electro-Chemical Co. v. Commissioner*, 311 U.S. 513; *Helvering v. Hammel*, 311 U.S. 504; *White v. United States*, 305 U.S. 281; *Martin General Agency v. Commissioner*, 101 F. 2d 165 (C.A. 9th); *Feine v. McGowan*,

United States (C.A. 9th), decided September 12, 1958 (58-2 U.S.T.C., par. 9831), certiorari denied, 358 U.S. 945; *Hickerson v. Commissioner*, *supra*; *Berwind v. Commissioner*, *supra*; *Towers v. Commissioner*, 24 T.C. 199, affirmed, 247 F.2d 233 (C.A. 2d), certiorari denied, 355 U.S. 914; *Wheeler v. Commissioner*, decided May 27, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,138), affirmed *per curiam*, 241 F.2d 883 (C.A. 2d); *Commissioner v. Smith*, 203 F.2d 310 (C.A. 2d), certiorari denied, 346 U.S. 816. See *Higgins v. Commissioner*, 312 U.S. 212; *Continental Trading, Inc. v. Commissioner* (C.A. 9th), decided March 10, 1959 (59 U.S. T.C., par. 9316).

188 F. 2d 738 (C.A. 2d); *Culley v. Commissioner*, 29 T.C. 1076; Section 29.23(e)-1, Treasury Regulations 111 (Appendix, *infra*). And, of course, any loss in this case on the subsequent sale of the property received by the taxpayer by virtue of the liquidation would likewise result from the sale or exchange of a capital asset and be subject to the limitations of the capital loss provisions (Secs. 23(g) and 117 of the 1939 Code).

B. Eagle Timber was a corporate entity for tax purposes and may not be disregarded by its owner merely to obtain tax advantages

The present case belongs to a long line of cases dealing with the question whether a business unit should be recognized or disregarded for purposes of the taxing law. This case presents the usual situation where the taxpayer-owner of a corporation contends (Br. 55-57) that in order to improve his position tax-wise he can disregard the corporation, and that the Tax Court as a matter of law was compelled to adopt his contention, although the corporation was created for business purposes, actually conducted business transactions, and was represented to the public as a corporation.

The difficulty with this position is that, as we shall show, the decided cases uniformly hold that taxpayers cannot disregard a corporate entity where the purpose of its creation was to engage in business activities *or* it actually was used in business transactions.

We start with the general rule that a corporation, tax-wise, is to be treated as an entity separate

and distinct from the individuals who own it. *Burnet v. Commonwealth Imp. Co.*, 287 U.S. 415, 419; *Burnet v. Clark*, 287 U.S. 410, 415; *Dalton v. Bowers*, 287 U.S. 404, 410. There is, however, an exception, and the entity may be disregarded *only* where (1) the purpose for its creation was not a business purpose, *and* (2) its creation was not followed by any business activity. *Estate of Whitfield v. Commissioner*, 14 T.C. 776, affirmed, 192 F. 2d 494 (C.A. 5th); *Paymer v. Commissioner*, 150 F. 2d 334 (C.A. 2d). Where, however, the purpose for the creation of the corporation is a business one *or* the creation is followed by business activity, the corporation cannot be disregarded. *National Carbide Corp. v. Commissioner*, 336 U.S. 422, 428-429; *Moline Properties v. Commissioner*, 319 U.S. 436, 439; *Skarda v. Commissioner*, 250 F. 2d 429, 433-434 (C.A. 10th); *Jackson v. Commissioner*, 233 F. 2d 289, 290 (C.A. 2d); *Buckley v. Commissioner*, 231 F. 2d 204 (C.A. 2d); *Palcar Real Estate Co. v. Commissioner*, 131 F. 2d 210, 212 (C.A. 8th); *Love v. United States*, 96 F. Supp. 919, 921 (C. Cls.); *Gray Holding Corp. v. Clawson*, 95 F. Supp. 928, 933-935 (Maine).

The Supreme Court has admonished taxpayers that, under the circumstances last discussed, the corporation they have created remains a distinct entity notwithstanding the purely utilitarian and *alter ego* aspects of its existence (*National Carbide Corp. v. Commissioner*, *supra*, pp. 428-429), and the facts that the individual owners retain direction down to the minutest detail, provide all the assets, and take all the profits are immaterial tax-wise (*National Car-*

bide Corp. v. Commissioner, supra, pp. 431-432). This principle applies though the corporate structure itself is incomplete (e.g., where there are no certificates of ownership actually issued, no corporate employees, no meetings of directors or shareholders, and no corporate books), but the business entity is held out to the public as a corporate body and in fact there are transactions in the name of the corporations. *Skarda v. Commissioner, supra*; *Estate of Whitfield v. Commissioner, supra*; *L. T. Campbell, Inc. v. Commissioner*, 159 F. 2d 629 (C.A. 5th); *Halprin v. Commissioner*, decided July 23, 1945 (1945 P-H T.C. Memorandum Decisions, par. 45,-254), affirmed *per curiam*, 154 F. 2d 112 (C.A. 2d); *Paymer v. Commissioner, supra*; *Love v. United States, supra*. Cf. *Maletis v. United States*, 200 F. 2d 97, 98 (C.A. 9th), certiorari denied, 345 U.S. 924.

In short, the taxing law does not permit taxpayers who commence business through corporations, or create corporations for valid business purposes, and, if all goes well, will realize the income tax and business advantages, to disclaim the business form created merely because it turns out to be a tax disadvantage. *National Carbide Corp. v. Commissioner, supra*, pp. 428-429; *Moline Properties v. Commissioner, supra*, p. 439; *Skarda v. Commissioner, supra*, p. 434; *Palcar Real Estate Co. v. Commissioner, supra*, p. 212; *Vim Securities Corp. v. Commissioner*, 130 F. 2d 106, 109 (C.A. 2d), certiorari denied, 317 U.S. 686; *Love v. United States, supra*, p. 921. Cf. *Maletis v. United States, supra*.

In the present case, Eagle Timber's existence as a corporate entity began in the State of Washington on October 22, 1946. (R. 109; Exs. 4 and D.) There were three directors or trustees of the corporation, namely, the taxpayer, his first wife, Phoebe, and one Tim Healy. (Ex. 4.) The capital of the corporation consisted of a sawmill and equipment and timber properties. (R. 108-109, 122-124.)

The business purposes of the corporation were stated in its articles of incorporation to be: to engage in a general logging, milling, plywood, timber, and lumber business, and to do all things relative or incidental thereto. (R. 109; Ex. 4.)

Subsequent to incorporation Eagle Timber, in its corporate name, entered into a logging contract with L. E. Peterson & Son. (Ex. 5, Washington Title Insurance Company report.) The corporation as a legal entity purchased property from the United States Forest Service. (Ex. C.) Eagle Timber borrowed money in December, 1946, executing its note and a mortgage on its property as security therefor. (R. 109; Ex. 8.) On February 3, 1947, the corporation, in its corporate name, again borrowed money, executing a real estate and chattel mortgage as security for its promissory note. (R. 110; Ex. G.) On July 24, 1948, Eagle Timber entered into a contract to sell its timber property. (R. 111.) In 1948 Eagle Timber was a party to a law suit in the Washington courts and a judgment was recovered against it as a corporate entity. (R. 111; Ex. 5, Washington Title Insurance Company report.)

Eagle Timber was held out to the public by the taxpayer as a Washington corporation. The taxpayer asserted to those dealing with the corporation that he was its president, and contracts were executed by him as president and his former wife, Phoebe, as secretary of the corporation. (R. 78, 98; Exs. E, F, G, 2-B, 3.) The taxpayer, under *oath*, asserted that Eagle Timber was a corporate entity and that he acted as its president when, on February 3, 1947, he executed a real estate and chattel mortgage for that corporation. (Ex. G.) On tax returns the taxpayer asserted that Eagle Timber was a distinct legal entity, and, in his original petition before the Tax Court, he made the same assertion. (R. 7; Exs. 1-A, E.)

It is difficult to conceive of a more appropriate case calling for the application of the principle that, while a taxpayer is free to adopt such organization for his affairs as he may choose, he is not free, after having chosen the corporate form, to disregard the arrangement whenever it is to his tax advantage to do so.⁵

⁵ In *Skarda v. Commissioner*, 250 F.2d 429, 432 (C.A. 10th), there were no meetings of stockholders of the corporation; the corporation adopted no by-laws; there were no officers *formally* elected; no minute books were kept, no corporate stock was issued; and no property was *formally* transferred to the corporation by its taxpayer-owners. The taxpayers contended (p. 433) that the corporation never came into existence, or that if it did it should be disregarded as a sham. The Tenth Circuit ruled (pp. 434-435) that, although directors and officers were not formally elected, there were *de facto* officers and directors; that the corporation *in fact* acquired capital; and that failure to comply otherwise with local statutes did not prevent corporate existence but at

Moreover, we have here not only valid and true business purposes for the creation of the corporation, to wit, to carry on timber transactions, but also actual business transactions in the corporate name to a

most rendered the corporation one *de facto* rather than *de jure*. The court concluded that, since the corporation was created for a business purpose and/or since transactions were had in the corporate name, the corporation could not be disregarded for tax purposes.

In *L. T. Campbell, Inc. v. Commissioner*, 159 F. 2d 629 (C.A. 5th), the taxpayer claimed that the corporate charter was unused, nothing had been done to complete the corporate structure, no corporate assets had been acquired, no franchise tax paid, no books of account kept, and no corporate officers functioned, and that, therefore, the corporate entity should be disregarded. There was business activity carried on in the name of the corporation. Although there was no formal transfer of property to the corporation, it was shown that those who acted for the corporation used certain property and listed it as corporate property. Corporate books were in fact kept, and it was held out to the world that the taxpayers were doing business for the corporation. The Court of Appeals affirmed the Tax Court's finding that for tax purposes the business was that conducted by a corporation and that the corporate entity could not be disregarded.

In *Paymer v. Commissioner*, 150 F. 2d 334 (C.A. 2d), there were two corporations, Raymep and Westrich. The corporations never held meetings, no officers were elected after a president and treasurer were appointed, and there were no corporate bank accounts and no office. The partners who created the corporations managed the real estate that was transferred to the corporations, collected the income, and paid expenses. Raymep, however, obtained a loan in its name and provided security for the loan. It was held that Westrich was a sham but that Raymep had to be recognized as a separate entity for tax purposes since, although organized merely to deter creditors, it was impracticable to use it solely for that purpose when it was desired to obtain a loan. This activity was sufficient business to bring Ray-

greater extent than in several of the cases cited in footnote 5 below wherein it was held that the corporation could not be disregarded for tax purposes. Various loans were transacted, purchases were made,

mep within the general rule forbidding the disregarding by taxpayers of a corporation which they used to transact business.

In *Halprin v. Commissioner*, decided July 23, 1945 (1945 P-H T.C. Memorandum Decisions, par. 45,254), affirmed *per curiam*, 154 F. 2d 112 (C.A. 2d), the corporation was organized to hold title to real property, no certificates of stock were issued, the corporation never had employees, never held meetings, never had a bank account, and never had any capital other than the real estate. However, the property was rented and transactions concerning mortgages, taxes, and insurance were had in the corporate name. It was held that the corporation served its purpose, that the activity was a business activity, and that, therefore, it must be recognized for tax purposes.

In *Palcar Real Estate Co. v. Commissioner*, 131 F. 2d 210 (C.A. 8th), the corporation executed a note and a mortgage in its name and there was a corporate bank account. It was held that the corporation could not be declared a nominality for income tax purposes.

In *Sheldon Bldg. Corp. v. Commissioner*, 118 F. 2d 835 (C.A. 7th), the corporation held a bank account and entered into leases; it was held that since there was business activity in the name of the corporation it could not be considered a sham.

In *Love v. United States*, 96 F. Supp. 919 (C.Cls), the corporation had no capital stock paid in, it never owned a bank account, and it kept no books of account. However, the corporation leased property, executed deeds, filed federal social security tax returns which reported employer and employee taxes, and it paid United States unemployment taxes. It was held that there was business activity carried on through the corporation and therefore the corporation remained a distinct entity for tax purposes.

These cases are indicative of the uniform judicial application of the principles involved in the present case.

contracts were entered into, and mortgages and deeds were executed, all in the corporate name. Under the authorities previously discussed this record is ample support for the finding of the Tax Court (R. 118) that, for tax purposes, the corporation was a separate entity from the individual who owned it.

The taxpayer, however, asserts (Br. 35-50) that there was no corporation tax-wise because there were no directors or officers, and there was no issuance of stock and no acquisition of capital. This contention has no merit.

Section 23.01.050(2) of 2 Revised Code of Washington (Appendix, *infra*) provides that upon the issuance of the certificate of incorporation "the corporate existence shall begin", and Section 23.01.090 of that Code (Appendix, *infra*) provides that the certificate of incorporation issued by the secretary of state "shall be conclusive evidence of the fact that the corporation has been incorporated."

In this case the triplicate originals of articles of incorporation were filed with the Secretary of the State of Washington, at Olympia, Washington; all taxes, fees, and charges were paid; and the Secretary of State endorsed his approval and filed the articles on October 22, 1946. One set of the articles was then filed in the office of the auditor of King County, the county in which the registered office of the corporation was situated, and the other set of articles was retained by the corporation. Filing fees were also paid to King County. (R. 53-54, 109; Ex. 4.) This was complete compliance with Section 23.01.050 of 2 Revised Code of Washington, and therefore the

corporation was an existing entity under local law as of October 22, 1946. Indeed, a signed and sealed certificate from the Secretary of State of Washington, introduced into evidence as Exhibit D (R. 91), states that Eagle Timber was incorporated on October 22, 1946. Moreover, the articles of incorporation were introduced in evidence as Exhibit 4 (R. 53-54) and that is conclusive evidence under local law of the fact that the corporation had been incorporated. Section 23.01.090 of 2 Revised Code of Washington. Thus, it would appear that the corporation was one *de jure* since all conditions precedent to corporate existence were complied with. Its existence was to be perpetual (Ex. 4, p. 1), and it did not cease to be a corporate entity until July 1, 1950, when it was dissolved for failure to pay license fees. (R. 112).

The taxpayer, however, contending that Eagle Timber was not given capital, relies (Br. 19, 44-50) upon Section 23.01.080(1) of 2 Revised Code of Washington (Appendix, *infra*) for his theory that no corporation existed. That section sets out prerequisites for a corporation's commencement of business. Those requirements are that (a) a triplicate original of the articles of incorporation must have been filed in the office of the county auditor;⁶ (b) the amount of paid-in capital with which it will begin business, as stated in the articles of incorporation, has been fully paid; and (c) there must be filed

⁶ It is conceded that this requirement was satisfied. (R. 53-54, 109.)

in the office of the auditor of the county in which the corporation has its registered office an affidavit by directors stating that the amount of paid-in capital as stated in its articles of incorporation has been fully paid. The only penalty the statute exacts for failing to conform with that section is that officers may be held liable for corporate debts. On the other hand, stockholders remain protected by the corporate entity, and the existence of the corporation is not at all affected. The taxpayer's contention (Br. 44-50) that Eagle Timber had no capital is erroneous because, as we will point out below, the record *in fact* establishes, and the Tax Court found as a fact, that that corporation was given capital (R. 118, 123-124), and the finding is supported by the evidence and certainly is not clearly erroneous.

The record here discloses that the taxpayer purchased timber property and had the vendors transfer the property to the corporation on October 24, 1946. The statutory warranty deed naming Eagle Timber as grantee and the bill of sale were filed with the auditor of King County, Washington, on January 6, 1947. (R. 108; Exs. 2-B, 3.) A title insurance company's report which was written on September 8, 1951, shows that title to the property was in the corporation. (Ex. 5, Washington Title Insurance Company report.) Moreover, in subsequent transactions Eagle Timber mortgaged the property on several occasions in order to obtain loans. (R. 109-110.) The taxpayer also transferred a sawmill to the corporation prior to February, 1947. (R. 109.) The corporation subsequently mortgaged the sawmill

in order to obtain a loan and the mortgage provided that Eagle Timber, a Washington corporation, owned this property. (R. 110.) Indeed, in 1948 Eagle Timber attempted to sell the sawmill and the timber to Sterling Timber and Lumber Company for \$90,000, in which contract it is stated that title to all the property is in Eagle Timber, and it was signed for Eagle Timber by the taxpayer as an officer of the corporation. (R. 111; Ex. C.) Moreover, judgments recovered against Eagle Timber, as a corporation, were liens on the property. (Ex. 5, Washington Title Insurance Company report.) In view of the foregoing, we submit that the Tax Court's finding (R. 118, 122-124) that the property discussed belonged to Eagle Timber is unassailable.

The required amount of capital was stated in the certificate of incorporation to be \$500 (Ex. 4) and the corporation was given capital before February, 1947, which was apparently worth thousands of dollars more than \$500. This was substantial compliance with the statutory requirement in question. *Skarda v. Commissioner*, 250 F. 2d 429, 435 (C.A. 10th).

But even if, *arguendo*, we consider the paid-in capital not substantial compliance with Section 23.01.080 (1) of 2 Revised Code of Washington because the directors did not file an affidavit stating that at least \$500 worth of capital had been paid in, this at most would render the corporation one *de facto*,⁷ subject

⁷ Substantial compliance with local statutes will make a corporation *de jure*. But the failure of some substantial requirement, although preventing the body from being *de jure*,

only to a direct attack by the state. The same observation applies to the taxpayer's other contentions (Br. 38-44) that no corporation existed because no stock was issued, no meetings were held, etc. It should be noted that the failures of compliance relied upon by the taxpayer do not, under the Revised Code of Washington, end corporate existence. Indeed, the taxpayer's entire argument fails to recognize well-established distinctions. The applicable principle is stated in *Skarda v. Commissioner, supra*, as follows (p. 435) —

statutory conditions to the right to engage in business [or other conditions], to be performed after the corporation has been formed, are conditions subsequent, and while a noncompliance therewith may give the state a right to proceed to forfeit the franchise, such noncompliance in the absence of such proceeding does not in anywise affect the legal existence of the corporation.

In accord are: *Wells Co. v. Gastonia Co.*, 198 U.S. 177, 185-186; *Refsnes v. Myers*, 164 Wash. 205, 209-210, 2 P. 2d 656, 657; *Carroll v. Pacific National Bank*, 19 Wash. 639, 641, 54 Pac. 32, 33; *Pierce Co. Dairymen's Ass'n v. Templin*, 124 Wash. 567, 571-572, 215 Pac. 352, 353-354; *American Radiator Co. v. Kinnear*, 56 Wash. 210, 212-213, 105 Pac. 630, 631; *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 178, 60 Pac. 141, 143; *Midwest Air Filters Pacific, Inc. v. Finn*, 201 Cal. 587, 592-593,

will not prevent the corporation from being *de facto* where there is user pursuant to attempted organization. *Henry v. Markesan State Bank*, 68 F. 2d 554, 558 (C.A. 8th).

258 Pac. 382, 384-386; *Drake Hotel Co. v. Crane*, 210 Mo. App. 452, 240 S.W. 859; *Murdock v. Lamb*, 92 Kan. 857, 142 Pac. 961; 8 Fletcher, Cyclopedia of Corporations (Revised and Permanent ed., 1931), Sec. 3802 (p. 108).

In *Skarda v. Commissioner*, 250 F. 2d 429, the Tenth Circuit held that the corporation whose existence was there being questioned was at least a *de facto* corporation, required to be recognized as a distinct entity, separate and apart from the taxpayers who owned it. This was so held even though there were (p. 432) no meetings of stockholders or directors, no by-laws adopted, no officers formally elected, no corporate stock issued, no minute books kept, and no property was formally transferred to the corporation. The present case is stronger for that conclusion than was *Skarda* because here we have among other things, property that was formally transferred to the corporation while in *Skarda* it was necessary for the court to determine from all the facts (pp. 434-435) that the corporation received capital from its owners.

Further, it should be noted that, quite contrary to the taxpayer's assertions (Br. 38-44), the record shows that Eagle Timber had directors or trustees and officers authorized to act for it. The articles of incorporation named the taxpayer and Phoebe (his former wife) and one Healy as trustees or directors until their successors should be elected and qualified. (Ex. 4, p. 2.) So far as the record indicates, all parties interested in the corporation authorized the taxpayer to act as its president and Phoebe to act

as its secretary. (See R. 78, 112; Exs. B, C, G and 8.) Accordingly, the taxpayer and Phoebe acted as president and secretary of Eagle Timber in all business transactions and they were held out to the public as such representatives. Thus, the directors and officers, authorized to act as such by the articles of incorporation, and with tacit consent of all interested as well as disinterested parties, held over without challenge, discharging the duties of their offices in conducting the corporate affairs in accordance with the articles of incorporation.

It needs little citation of authority to show, and it is too well settled to dispute, that under these circumstances the directors and officers of the corporation, if not *de jure* were at least *de facto*, having the same rights and authority as officers *de jure*. *Independence Lead Mines Co. v. Kingsbury*, 175 F. 2d 983, 985-986 (C.A. 9th), certiorari denied, 338 U.S. 900; *Pacific State Bank v. Coats*, 205 Fed. 618, 621 (C.A. 9th); *Skarda v. Commissioner*, *supra*, pp. 434-435; *Spokane v. Amsterdamsch Trustees Kantoer*, 22 Wash. 172, 177, 60 Pac. 141, 143. Moreover, a failure to elect directors or officers will not prevent the existence of at least a *de facto* corporation. *Drake Hotel Co. v. Crane*, 210 Mo. App. 452, 240 S.W. 859.

To summarize, in the case at bar there were *in fact* directors and officers of the corporation; there were, in fact, thousands of dollars worth of capital in the corporate name; the articles of incorporation certified that each of the incorporators subscribed for stock (Ex. 4); and corporate powers were exercised.

It appears, therefore, that there was substantial compliance with local statutes so that the corporate entity was one *de jure*. But, if there is any doubt about this, Eagle Timber was certainly a *de facto* corporation, subject only to a direct attack by the state, and, as the record shows (R. 112; Ex. D), the state never questioned its right to do business, no less its existence, until July 1, 1950, when the corporation was dissolved for failure to pay annual corporate license fees (R. 112). Furthermore, for tax purposes, the courts have uniformly refused to disregard corporate entities in cases where their organization was incomplete but there was, as here, a business purpose for incorporation or transactions were executed in the corporate name. See fn. 5, *supra*.

- C. *The Tax Court's findings, that the taxpayer's contributions to Eagle Timber were contributions to its capital and that the taxpayer did not prove that he realized a loss when he allegedly sold property that he had previously received upon the liquidation of that corporation, are not clearly erroneous*

As noted, under Point I-A, *supra*, the taxpayer contended in the Tax Court that his advances to Eagle Timber constituted debts but the Tax Court found that they were contributions to capital. (R. 124.) The question whether advances to a corporation constitute loans or contributions to capital is one of fact. *Earle v. W. J. Jones & Son*, 200 F. 2d 846, 847 (C.A. 9th); *Bair v. Commissioner*, 199 F. 2d 589, 591 (C.A. 2d); *Powers Photo Engraving Co. v. Commissioner*, 197 F. 2d 704, 705 (C.A. 2d); *Gooding Amusement Co. v. Commissioner*, 236 F. 2d 159,

166 (C.A. 6th), certiorari denied, 352 U.S. 1031. The present record shows that Eagle Timber had no capital before the taxpayer transferred the sawmill and the timber property to it. (R. 108-109). The corporation's business purpose was to engage in the timber business (Ex. 4), and the property thus transferred to it was necessary to that business. There were no notes evidencing that Eagle Timber was obligated to the taxpayer, and no interest, so far as the record shows, was promised or accrued to the taxpayer. The taxpayer did not testify that he expected to be repaid other than as an investor. Likewise, a fact of great importance to a finding of a debt was not shown to exist, to wit, that there was a fixed date for repayment or within which to demand repayment. *241 Corp. v. Commissioner*, decided July 25, 1956 (1956 P-H T.C. Memorandum Decisions, par. 56,174), affirmed *per curiam*, 242 F. 2d 759 (C.A. 2d), certiorari denied, 354 U.S. 938; *May Hosiery Mills v. Commissioner*, 123 F. 2d 858, 860 (C.A. 4th); *Haffenreffer Brewing Co. v. Commissioner*, 116 F. 2d 465, 468 (C.A. 1st), certiorari denied, 313 U.S. 567; *Jewel Tea Co. v. United States*, 90 F. 2d 451, 453 (C.A. 2d).

Considering all the factors in the record, the situation is clearly that of a taxpayer investing in a corporate venture, taking the risk of losses so that he may enjoy the profits. Any loss as a result of the investment would, therefore, be a loss of venture capital, not deductible as a bad debt. *National Carbide Corp. v. Commissioner*, 336 U.S. 422, 435, fn. 16; *Root v. Commissioner*, 220 F. 2d 240, 241 (C.A.

9th); *Schnitzer v. Commissioner*, 13 T.C. 43, 62, affirmed *per curiam*, 183 F. 2d 70 (C.A. 9th), certiorari denied, 340 U.S. 911; *Dobkin v. Commissioner*, 15 T.C. 31, affirmed *per curiam*, 192 F. 2d 392 (C.A. 2d); *Cohen v. Commissioner*, 148 F. 2d 336, 337 (C.A. 2d); *Thomas v. Commissioner*, 2 T.C. 193, 196; *Kalech v. Commissioner*, 23 T.C. 672, 680-681. As we have previously pointed out, the taxpayer does not contest the finding of the trial court that the contributions constituted an investment, and the record fully supports that finding.⁸

The second issue to be discussed here is a contested one; it is whether the taxpayer proved that he realized a loss in 1952. The taxpayer bears the burden of proof in showing that a loss was sustained in the year for which he claims a deduction, and the question is one of fact, subject to the clearly erroneous rule. *Boehm v. Commissioner*, 326 U.S. 287, 293, rehearing denied, 326 U.S. 811; *Burnet v. Houston*,

⁸ Since the Tax Court found that the contributions were investments, its additional finding (R. 124) that the contributions were not debts is also clearly correct. It is well settled that subsections (e) and (k) of Section 23 of the 1939 Code are mutually exclusive, and a loss which in its nature is due to an investment must be taken as a deduction under subsection (e) or not at all. See *Putnam v. Commissioner*, 224 F. 2d 947 (C.A. 8th), affirmed, 352 U.S. 82; *Spring City Co. v. Commissioner*, 292 U. S. 182. Moreover, it should be noted that in no event could the Tax Court have considered \$2,000 of the alleged \$19,139.94 loss to be a debt, since it was paid merely to purchase another stockholder's interest in Eagle Timber. (R. 110-111.) The other shareholder was Mr. Norris who apparently was considered half owner of the corporation. (R. 57.)

283 U.S. 223, 227; *Finney v. Commissioner*, 253 F. 2d 639, 641-642 (C.A. 9th). The taxpayer concedes (Br. 58) that if the timber and sawmill were properties belonging to Eagle Timber, then when Eagle Timber was dissolved on July 1, 1950, the taxpayer received, as the Tax Court found (R. 125), a liquidating dividend and the amount so distributed to him must be treated by him as in full payment in exchange for his interest in Eagle Timber. As we have shown in subpoint B, *supra*, the Tax Court properly found that the timber and sawmill constituted property belonging to the corporation. The finding that a distribution was made in liquidation of a corporation is one of fact (*Gensinger v. Commissioner*, 208 F. 2d 576, 583 (C.A. 9th); *Holmby Corp. v. Commissioner*, 83 F. 2d 548, 549-550 (C.A. 9th); *Transportation Service Associates, Inc. v. Commissioner*, 149 F. 2d 354, 355 (C.A. 3d)), and the taxpayer does not seriously controvert it.

Upon a liquidation of a corporation, gains or losses are taxed on the same basis as gains or losses upon sales or exchanges of property, and are subject to the capital gain or loss provisions of the revenue statutes. Sections 23(g), 115(c), and 117 of the 1939 Code; *White v. United States*, 305 U.S. 281; *Martin General Agency v. Commissioner*, 101 F. 2d 165 (C.A. 9th); Rev. Rul. 55-737, 1955-2 Cum. Bull. 570. Accordingly, as the Tax Court held (R. 125), the taxpayer realized in 1950 a gain or loss when he acquired the timber and sawmill properties in liquidation, based upon the adjusted basis of his investment in Eagle Timber and the fair market value of

the property acquired at the time of the distribution. Section 111(b) of the 1939 Code (Appendix, *infra*); *Westover v. Smith*, 173 F. 2d 90, 92 (C.A. 9th); *Fleming v. Commissioner*, 153 F. 2d 361, 363 (C.A. 5th). Upon the subsequent alleged sale of the property in 1952 (R. 125) his cost or basis for determining gain or loss was, therefore, its fair market value at the time acquired. See *Florida Machine & Foundry Co. v. Fahs*, 73 F. Supp. 379, 381 (S.D. Fla.), affirmed, 168 F. 2d 957 (C.A. 5th); *McCullough v. Commissioner*, 153 F. 2d 345, 347 (C.A. 2d); *Bennett v. Commissioner*, 139 F. 2d 961, 964-965 (C.A. 8th); *Gloyd v. Commissioner*, 19 B.T.A. 966, 968, affirmed, 63 F. 2d 649 (C.A. 8th), certiorari denied, 290 U.S. 633; *Cerro De Pasco Copper Corp. v. United States*, 13 F. Supp. 633, 639 (C. Cls.), certiorari denied, 298 U.S. 686; *Feathers v. Commissioner*, 8 T.C. 376, 382; *Anderson v. Commissioner*, 19 B.T.A. 371, 375; *Staley v. Commissioner*, 15 B.T.A. 625, 626. The taxpayer is familiar with this principle and used it in computing his gain from the sale of property which he had received upon liquidation of another corporation. (Ex. O.)

The taxpayer introduced no evidence with respect to the fair market value of the properties in 1950, and hence it is impossible to determine whether or not a loss was realized in 1952, the year for which he claims the deduction. Although he was given notice by the Commissioner in 1955 that he would have to prove his basis for the property in order to establish a loss (R. 12), yet at the trial below he did not testify as to the fair market value of the

timber and sawmill in the year 1950, nor did he have any witnesses, expert or otherwise, testify with respect to such value.

In order to determine a loss under Section 23(e) of the 1939 Code the statute makes it absolutely necessary for the taxpayer to prove his basis, and if he does not do so before the trial court he is not entitled to a deduction. Proof of basis is a specific fact which the taxpayer has the burden of proving. *Burnet v. Houston*, 283 U.S. 223, 228-229; *Long v. Commissioner*, 96 F. 2d 270, 272 (C.A. 9th), certiorari denied, 305 U.S. 616; *Gulf, M. & N. R. Co. v. Commissioner*, 83 F. 2d 788, 791 (C.A. 5th), certiorari denied, 299 U.S. 574; *McGinley Corp. v. Commissioner*, 82 F. 2d 56, 58 (C.A. 5th). In this case the taxpayer's evidence on the point is non-existent and therefore the presumption in favor of the Commissioner's determination was never rebutted. Further, even if we examine the record without considering the presumption of correctness of the Commissioner's determination, it is clear that the taxpayer did not prove his basis in the properties so as to enable the Tax Court to determine that he realized a loss in 1952, and, accordingly, the Tax Court's finding on this factual question cannot be assailed as clearly wrong.⁹ *Boehm v. Commissioner*, *supra*, p. 294; *Burnet v. Houston*, *supra*, pp. 227-229; *Finney v. Commissioner*, 253 F. 2d 639, 641-642 (C.A. 9th);

⁹ This is not a case where the trial court found there was a loss and merely refused to allow a deduction of some portion thereof. Here, without proof of basis, as the Tax Court held (R. 125), it cannot be determined whether a loss was

Long v. Commissioner, 96 F. 2d 270, 272 (C.A. 9th), certiorari denied, 305 U.S. 616; *Royal Packing Co. v. Lucas*, 38 F. 2d 180, 181-182 (C.A. 9th); *Dab v. Commissioner*, 255 F. 2d 788, 790 (C.A. 2d); *Bennett v. Commissioner*, 139 F. 2d 961, 964-965 (C.A. 8th).

The taxpayer's suggestion (Br. 60-61) that there was no liquidation in 1950 when the corporation was dissolved, because local statutes with respect to distribution of such assets were not complied with, is interesting. Under Section 23.60.150 of 2 Revised Code of Washington (Appendix, *infra*), where a corporation is dissolved for nonpayment of fees, the directors hold its assets as trustees for the benefit of creditors and shareholders, to be disposed of in appropriate court proceedings. *Gamble v. Alder Group Mining & S. Co.*, 5 Wash. 2d 578, 105 P. 2d 811. The taxpayer, therefore, became a trustee of the corporate assets in 1950 for the benefit of creditors and himself, as sole owner of the corporation.

Whether or not a corporation has made a distribution of assets in liquidation is a question of federal and not state law. *Ward M. Canady, Inc. v. Commissioner*, 29 B.T.A. 355, 361, affirmed, 76 F. 2d 278 (C.A. 3d), certiorari denied, 296 U.S. 612. See *Gensinger v. Commissioner*, 208 F. 2d 576 (C.A. 9th). The question is whether in *fact* a distribution was made; here, the Tax Court found that there was a distribution. (R. 124-125.) *Holmby Corp. v. Com-*

realized in 1952. *McGinley Corp. v. Commissioner*, *supra*; cf. *Chesbro v. Commissioner*, 225 F. 2d 674 (C.A. 2d), certiorari denied, 350 U.S. 995.

missioner, 83 F. 2d 548, 549-550 (C.A. 9th). Moreover, since the taxpayer held the assets under local law as a trustee for the shareholders and not as trustee for the corporation, the tax law considers the shareholders as having received a distribution at the time the trust was created. *Hines v. United States*, 90 F. 2d 957, 958-959 (C.A. 7th), certiorari denied, 302 U.S. 756. Also, it would appear on this record that since the taxpayer was in effect trustee for himself, and since he testified that he considered the property as his own (R. 75), there was a distribution to him in *fact* in 1950 when he became a trustee. *Gensinger v. Commissioner*, *supra*.

However, if we give technical effect to local law, as the taxpayer seems to contend for (Br. 60-61), then he has clearly not established a loss in 1952. In that event, since the taxpayer was merely a trustee and no court proceedings were had to distribute the property, the record does not establish that there was a closed transaction which could establish a loss in 1952. For a loss to be deductible under Section 23(e) of the 1939 Code it must be evidenced by a closed and completed transaction. *Boehm v. Commissioner*, 326 U.S. 287, 291; *Stiver v. Commissioner*, 90 F. 2d 505, 507 (C.A. 8th). Proof of losses on an investment in a corporation may be shown in two ways: first, when the investment in the corporation is *disposed of*; secondly when the investment, in fact, becomes *totally worthless*. The revenue statute does not allow as a deduction partial losses as a result of mere diminution in value of an investment, and so long as it has value a de-

duction cannot be taken. *Jones v. Commissioner*, 103 F. 2d 681, 684-685 (C.A. 9th); *Royal Packing Co. v. Lucas*, 38 F. 2d 180, 181-182 (C.A. 9th); *875 Park Avenue Co. v. Commissioner*, 217 F. 2d 699, 701 (C.A. 2d); *Dresser v. United States*, 55 F. 2d 499, 510-512 (C. Cls.), certiorari denied, 287 U.S. 635. In this case, if there was no distribution of property in liquidation, then the taxpayer's investment was not disposed of and there was no closed transaction. See Section 115(c) of the 1939 Code. Further, as the record shows, the taxpayer's investment in Eagle Timber had not otherwise become totally worthless in 1952 (R. 112-114); although we cannot be sure as to the exact amount of money the taxpayer would receive upon a distribution, it was reasonably certain in 1952 that he would receive something, and hence his investment still had value in that year. Accordingly, no deduction is allowable in these proceedings.

D. Other reasons for denying a deduction to the taxpayer for the year 1952

1. We will first discuss the timber property. The taxpayer contends (Br. 62) that there was a completed or closed transaction with respect to the timber property because of an alleged sale for \$2,000 in 1952. Aside from the fact that the taxpayer did not prove his basis for this property so that it could be determined whether he realized a loss, he cannot prevail because, in fact, there was no sale in 1952.

Where the identifiable event relied upon to establish a loss is a sale, the transaction must be one of

present sale, otherwise there is no closed transaction. *Stiver v. Commissioner*, 90 F. 2d 505, 508 (C.A. 8th); *Hanson v. Commissioner*, 23 B.T.A. 590, 601, 604. The evidence with respect to this transaction shows that the taxpayer received an *offer* of \$2,000 in 1952 and received a check from the offerer for \$500 on December 4, 1952, but the check was not to be cashed until the spring of 1953. (R. 63.) In the meantime, the taxpayer continued to pay taxes on the property. (R. 63.) In the spring of 1953 the other party decided that he did not wish to go through with the sale and the \$500 was never cashed. (R. 63.) It is therefore clear that there was no executed or present sale in 1952. The other party never paid the purchase price, nor was he obligated to pay it; title to the property was never transferred; and none of the benefits or burdens of ownership were transferred. (R. 63.)

The only other method the taxpayer could use to establish a loss in 1952 would therefore be to show that he abandoned the property in that year and hence that it was absolutely worthless. Mere diminution in value, as previously discussed, gives rise to no loss in the absence of a closed transaction such as a sale or abandonment. Abandonment consists of two elements: (1) an affirmative act indicating abandonment; and (2) an intent to abandon—a clear and unmistakable affirmative act indicating a purpose to repudiate ownership. Both of these elements must occur in the taxable year for which the loss is claimed. *Beus v. Commissioner*, 261 F. 2d 176 (C.A. 9th); *Harriss v. Commissioner*, 143 F. 2d 279, 282

(C.A. 2d); *Helvering v. Jones*, 120 F. 2d 828, 830 (C.A. 8th), certiorari denied, 314 U.S. 661.

Here, as a matter of law, the taxpayer could not be held to have abandoned the property in 1952, since during that entire year either he was negotiating for the sale of the property or the property was subject to an executory contract for a sale, and he was paying taxes on the property. (R. 63, 112.) The property was, therefore, not abandoned and not worthless in 1952. As the taxpayer testified (R. 63), it was in 1953 when he first considered the property worthless and stopped paying taxes on it. The taxpayer may not, therefore, take any loss whatsoever with respect to the timber property for the taxable years involved in this proceeding.

2. Here we concern ourselves with the sawmill property. With respect to this property, as previously discussed, the taxpayer did not establish his basis, which is an essential fact in order to determine whether he realized a loss in 1952. But the taxpayer is not entitled to a loss deduction for other reasons equally as fatal. The taxpayer claims the loss as incurred in a transaction entered into for profit under Section 23(e)(2) of the 1939 Code. However, it is well settled that a taxpayer may not pick the year in which his loss shall fall. A taxpayer's allegation that a loss occurred in a particular year must be proved, mainly by objective facts and circumstances. *Royal Packing Co. v. Lucas*, 38 F. 2d 180, 182 (C.A. 9th); *Boesel v. Commissioner*, 208 F. 2d 817, 819 (C.A. 2d). In accordance with the stated principle, a loss to be deductible must be an

unintentional parting with something of value. *Feine v. McGowan*, 188 F. 2d 738, 740 (C.A. 2d); *Dresser v. United States*, 55 F. 2d 499, 510 (C. Cls.), certiorari denied, 287 U.S. 635. A taxpayer may not voluntarily part with something of value and thereby create a loss in the particular year he chooses. This does not mean that the taxpayer may not dispose of his property by sale in the year he chooses to do so, but it does mean that when his alleged loss is based upon a sale it is essential to a transaction entered into for profit that the highest and best price be obtained for the property sold. *Feine v. McGowan*, *supra*. Where a taxpayer voluntarily parts with value, a transaction that may have been initiated as one for profit may, in law, be transformed into one not for profit. *Feine v. McGowan*, *supra*.

In this case the taxpayer testified, in effect, that the mill was worth much more than the \$12,500 that he had agreed to sell it for, but that he settled for \$12,500 because that was "satisfactory to" him. (R. 70, 73.) The taxpayer received *no cash* on the alleged sale, but received a note secured by a mortgage on the sawmill. (R. 113.) It is clear, therefore, that the taxpayer parted voluntarily with value and, under the principles discussed in the previous paragraph, he did not, for this reason alone, prove himself entitled to a loss deduction within the meaning of Section 23(e)(2) of the 1939 Code.

3. The taxpayer likewise has failed to prove that he owned the property upon which he bases his alleged loss. It was stipulated (R. 35), and found by the Tax Court (R. 111), that a large portion of the

investment in Eagle Timber was made with community funds of the taxpayer and his former wife, Phoebe. The taxpayer was divorced from Phoebe in 1951. (R. 116.) Accordingly, as a matter of law, one-half of the taxpayer's claimed interest in Eagle Timber, and in the property received by virtue of the liquidation of that corporation, belonged to Phoebe. *In re Coffey's Estate*, 195 Wash. 379, 81 P. 2d 283.

However, as a result of the decree of divorce which incorporated in it a settlement agreement (R. 116; Exs. H and I), the taxpayer transferred his one-half interest in the marital community to Phoebe; hence, it would appear that under local law the taxpayer owned either one-half or none of the property in question.¹⁰ Accordingly, the taxpayer may not, for those reasons alone, take the *entire* loss allegedly sustained as an offset against his own income on a return made by him in 1952 with another wife. *Sanders v. Commissioner*, 225 F. 2d 629, 636 (C.A. 10th), certiorari denied, 350 U.S. 967; *Stewart v. Commissioner*, 95 F. 2d 821, 822 (C.A. 5th). Cf. *Poe v. Seaborn*, 282 U.S. 101.

¹⁰ Although the taxpayer testified that Phoebe never made claim to the property and that it was treated as his (R. 75), the documentary evidence shows that while she was mentally competent she took an active part in matters affecting Eagle Timber (Exs. B, G, J, K, and 4). The taxpayer did not testify that subsequent to the decree of divorce Phoebe transferred to him her interest in the properties, and, in view of the documents in evidence, such proof, if it were in the record, would have to be nothing less than unequivocal. (R. 75.)

II

The Tax Court's Finding, That the Taxpayer's Loss Allegedly Sustained In 1951, As An Escrow Agent, Was Not Incurred In His Trade or Business, Is Not Clearly Erroneous

A. Payments by the taxpayer to protect himself from threats of racketeers, which were threats against him personally and not against his business, are predominantly personal in nature and therefore not deductible as business expenses

The taxpayer's contention under this point (Br. 28-35) is that he is entitled to deduct a loss which he allegedly sustained as an escrow agent as a loss "incurred in trade or business" under Section 23(e) (1) of the 1939 Code. That section, however, must be read in conjunction with the statutory mandate found in Section 24(a) (1) (Appendix, *infra*), which requires that in computing net income no deduction shall—

in any case be allowed in respect of—

(1) Personal, living, or family expenses * * *
[Italics supplied.]

Section 24(a) (1) is broad and by its terms disallows "in any case" expenses which are in their nature personal. Thus, it prevents deductions of personal expenses which might otherwise be allowed under other provisions of the statute. Accordingly, it is held that expenses of a personal nature are not deductible regardless of business requirements. *Sparkman v. Commissioner*, 112 F. 2d 774 (C.A. 9th); *Commissioner v. Doak*, 234 F. 2d 704 (C.A. 4th). The question whether expenses are in their

nature personal is one of fact, subject to the clearly erroneous rule. *American Properties, Inc. v. Commissioner*, 262 F. 2d 150 (C.A. 9th).

The Tax Court found that the expenditure in question was a personal one and therefore denied the deduction. (R. 127-128.) The evidence of record on this point is as follows:

Mr. McCaskey and Mr. Fesler owned Lucky Music Company of America (hereinafter referred to as Lucky Music), which company was a client of the taxpayer. They conceived of the idea of connecting a phonograph to a slot machine so that the slot machine could be used in states where they were otherwise illegal. The principle of the idea was that the customers would not be paying to play the slot machine but would be paying to play the phonograph. (R. 85.) McCaskey and Fesler agreed, in 1949, to sell 25 machines to Fezzler, Magrini, and Lamb for a total price of \$12,500 for the manufacture and delivery of the machines. At the time of the agreement the machines were not yet manufactured and the purchasers did not give Lucky Music the money but instead chose to give it to the taxpayer as escrow agent. (R. 85-86, 126.) Lucky Music did not have the money to build the machines and the \$12,500 was to pay for the parts and the manufacture thereof. The obligation of the taxpayer as escrow agent was described by him as follows (R. 102):

I was to release the money to the Lucky Music Company of America as the work progressed in the construction of these 25 machines.

Accordingly, the taxpayer paid the escrow funds to Lucky Music as the machines were built and completed, which was in 1950. (R. 126.) The purchasers, however, did not take delivery of the machines from Lucky Music in 1950 because they wished to await the outcome of an election in Tacoma, Washington. During this period McCaskey absconded with the machines and the money. (R. 86.) Fezzler, Magrini, and Lamb thereupon demanded their money from the taxpayer. The situation was described by the taxpayer as follows (R. 86): "these men, they are well known in what is called 'the rackets'. I was given the heat, that they were going to have their money or else." Solely because of the described circumstances, on April 19, 1950, the taxpayer executed a note for \$12,500 in favor of the racketeers. (R. 86.) In addition, in 1950 the taxpayer assigned his interest in an existing fund on deposit in an Oregon court as a settlement with the racketeers. (R. 19, 88, 103-104.) The amount of the fund that was due the taxpayer was determined by the Oregon court on December 30, 1950. (R. 118.) The court made payment to Fezzler, Magrini, and Lamb on November 14, 1951, in the total amount of \$11,083.34. (R. 103-104, 127.) The taxpayer claims one-half, or \$5,541.67, of the \$11,083.34 as a business loss for the year 1951.¹¹ (R. 16.)

¹¹ The reason that the taxpayer can in no event take but one-half of this loss is because the fund was community property of himself and his former wife, Phoebe, and therefore one-half of the loss is hers.

It is obviously clear that the payment in question was not necessary to, essential to, proximate to, or incurred in the taxpayer's trade or business as an attorney. But that observation is merely incidental to this portion of our discussion. The taxpayer, so far as the record shows, did not breach his escrow agreement. The terms of the escrow, as distinguished from the contract of sale, were, as the Tax Court found (R. 117), that the taxpayer was to pay the funds to Lucky Music as the machines were being constructed, and the taxpayer fully complied with the directions given him as an escrow agent (R. 102-103, 117, 126). The Tax Court, therefore, in accordance with the record before it, correctly found (R. 127) that the taxpayer did not breach his obligations as an escrow agent. Moreover, the taxpayer did not testify that he either breached or thought he breached his obligation as a depository. In 1950 the racketeers threatened him personally, put the "heat" on him, and demanded their money "or else" (R. 86); they did not threaten his business or his investment interests. Since the taxpayer did not testify as to the precise nature of the threats, it must be presumed that they were purely personal in nature, aimed at bodily harm to the taxpayer or his family—and whatever evidence there is in the case points to that conclusion. *Sparkman v. Commissioner*, 112 F. 2d 774, 777 (C.A. 9th); *McNeill v. Commissioner*, 251 F. 2d 863, 866 (C.A. 4th). The taxpayer's payment to the racketeers was made solely because of their threats and not to protect his business, to gain clients, to satisfy clients, or because

of any other factor incidental to any business the taxpayer was carrying on in the year 1951 when the loss was allegedly incurred. (R. 86, 127, 128.)

The foregoing, we submit, conclusively establishes that when the payments were made, they were made for reasons personal to the taxpayer, and he did not testify otherwise. But, even if there could be any doubt, the findings of the trial judge, on the record submitted to him, are not clearly wrong and should therefore be affirmed.¹² Indeed, since Section 24(a)

¹² The taxpayer's contention (Br. 29) that his obligation as an escrow agent was to deliver the machines to the purchasers is without merit. It is quite true that the agreement between the seller and the purchasers was one of sale, and therefore for both the manufacture and the delivery of the machines, but the *only evidence* in the case shows that the sole direction to the taxpayer as escrow agent was to release the money to Lucky Music as the work progressed on the construction of those machines (R. 102), and that is exactly what he did in complete fulfillment of the agency (R. 102-103). It is too well settled to admit of dispute that a depositary is obligated only to the extent of the directions given to him by the depositors. The taxpayer's attempt to testify, by statements in his brief on appeal, to facts which are not in the record cannot be given credence. Likewise, the taxpayer's contention, that the facts in this record did not permit a finding that he was personally threatened and that is why he paid the racketeers, is devoid of merit. The only facts of record show, as previously discussed, that the purchasers were racketeers who wished to purchase illegal slot machines designated as record players. When they did not get the machines they put the "heat" on the taxpayer and told him to pay "or else." (R. 86.) Certainly, a conclusion that these were threats against the taxpayer's person is the only reasonable conclusion to draw, and it cannot be assailed as clearly wrong.

The taxpayer's contention (Br. 32) that these were merely threats to bring proper proceedings for a breach of an es-

(1) of the 1939 Code forbids deductions of personal expenses in any case, it is held, as previously discussed, that although a business requires an expenditure it will not be deductible if it is *essentially* personal in nature. In this case we need not go that far for, since the taxpayer did not introduce a scintilla of evidence even suggesting that his business necessitated the expenditure or that the expense was beneficial to his business, the payment was personal and nondeductible.

B. The taxpayer's loss was not incurred in his trade or business as an attorney and therefore is not, in any event, deductible under Section 23(e)(2)

The question here is somewhat related to the question discussed under the preceding point, where it was shown that the expense or loss in question was in fact personal in nature and not deductible. The taxpayer, however, is not entitled to a deduction for the additional reason that the loss was not, in any event, incurred in a trade or business carried on by him in the taxable year 1951. The question here is whether the taxpayer's activity as an escrow agent was related to his professional activities as an attorney in the year in which he suffered the loss (*Mc-*

crow agreement is of course not supported by the record; indeed, the taxpayer does not state that these were the true facts, but merely says that unless they were the true facts the attorney who acted for the racketeers was acting illegally. So far as that attorney is concerned, he may have acted without knowledge of the actual facts. In any event, the Tax Court must decide cases on the record before it, and the only evidence in this case supports its findings.

Neill v. Commissioner, 251 F. 2d 863, 866 (C.A. 4th); cf. *Holtz v. Commissioner*, 256 F. 2d 865, 868 (C.A. 9th)), or whether the loss was proximate to, or incurred in, or essential to, his law practice (*Putnam v. Commissioner*, 224 F. 2d 947, 950 (C.A. 8th), affirmed on another issue, 352 U.S. 82).

So far as the record discloses, the transaction in issue represents the first instance in which the taxpayer acted as an escrow agent. It is clear, therefore, that he was not in business as an escrow agent. Further, although it is conceivable that an attorney who suffers losses as an escrow agent may suffer losses in the practice of law where, for example, he is acting as escrow agent in his capacity as an attorney for one of the parties, that is not the present case.

The record here, as previously discussed, does not in any way indicate that the taxpayer was acting in his capacity as an attorney when he became an escrow agent or when he suffered his loss. The racketeers were not his clients and he was to receive no fee, either as an escrow agent or as an attorney. In addition, there is no showing that he thought that the transaction would help or that it did in fact help his law practice. Likewise, the payments were not made as a result of his breach of any obligation in the course of his practice as an attorney. Thus, the taxpayer has not proved that the loss was incurred by him as an attorney, or that it was essential to his practice, or that it was attributable to the operation of any trade or business engaged in by him. *Putnam v. Commissioner*, *supra*; *McNeill v. Com-*

missioner, supra; Byrnes v. Commissioner, decided October 16, 1940 (1940 P-H T.C. Memorandum Decisions, par. 40,516), affirmed *per curiam*, 128 F. 2d 616 (C.A. 3d); *Libby v. Commissioner*, decided June 30, 1955 (1955 P-H T.C. Memorandum Decisions, par. 55,180); *Miller v. Commissioner*, decided December 30, 1954 (1954 P-H T.C. Memorandum Decisions, par. 54,344); *Treman v. Commissioner*, decided July 27, 1953 (1953 P-H T.C. Memorandum Decisions, par. 53,256).

The only fact disclosed by the record that the taxpayer could possibly rely upon is that one of the parties to the transaction, namely, Lucky Music, was a client of his, but it was not Lucky Music which asked the taxpayer to act as escrow agent (R. 85), and it is uniformly held in cases where attorneys sustain losses because of transactions on behalf of their clients, even where the attorney testifies that the transaction was to benefit his law practice, that such showing, with nothing more, does not establish a loss incurred by the attorney in the operation of his trade or business. *Putnam v. Commissioner, supra; McNeil v. Commissioner, supra; Libby v. Commissioner, supra; Miller v. Commissioner, supra*. Cf. *Pokress v. Commissioner*, 234 F. 2d 146, 150 (C.A. 5th).

Accordingly, even if the loss in question were not personal in nature, the taxpayer failed to produce any evidence to satisfy his burden of showing that it was incurred in his trade or business, and he is not, therefore, entitled to a deduction under Section 23 (e)(1) of the 1939 Code.

C. *The taxpayer is not entitled to a deduction in the year 1951 for the additional reason that the loss occurred in the taxable year 1950*

The taxpayer argues that, since he made his return on a cash basis and in the year 1950 he gave the racketeers a note only and not cash, there was no loss in 1950. (Br. 33-34.) The taxpayer again ignores the record and his contention is without merit. The facts set out in Point II-A, *supra*, show that the taxpayer gave his note to Fezzler, Magrini, and Lamb in 1950, but also in that year he assigned to them whatever interest he had in a fund held by a court in the State of Oregon. The only facts in the case on this point show unequivocally that this assignment was in settlement of the racketeers' demands and was not security for the note. (R. 19-20, 88, 104.) The taxpayer was fully entitled to the sums which were the subject of the assignment although the rights of various individuals to whom he assigned portions of the fund were not determined until 1951. (R. 118.) Since the taxpayer in 1950 assigned all his property interest in the existing fund in satisfaction of the demand of the racketeers, he actually suffered a loss in that year, and he may not, therefore, take a deduction for the payment in 1951. Cf. *Helvering v. Price*, 309 U.S. 409, 413; *Joe Bales-trieri & Co. v. Commissioner*, 177 F. 2d 867, 871 (C.A. 9th); *Heublien v. Commissioner*, 233 F. 2d 426 (C.A. 2d). Indeed, there were assignments of portions of the fund to others (Ex. S), and the taxpayer did not claim that he suffered his loss in the year 1951 when those assignees received payment

from the court rather than in the year when the assignments of the taxpayer's fixed property interest in the fund were executed. (Ex. P.)

Although the Commissioner did not make this contention before the trial court, it is well settled that a respondent can support the decision of a lower court on any ground and that the appellate court will affirm the trial court if its decision is correct for any reason.¹³

III

The Taxpayer's Failure to File a Declaration of Estimated Tax for the Taxable Year 1952 Was Not Due to Reasonable Cause and Therefore the Tax Court Was Clearly Correct In Finding Him Liable for An Addition To Tax Under Section 294(d)(1)(A) of the 1939 Code

Section 58(a) of the Internal Revenue Code of 1939 (Appendix, *infra*) provides that—

Every individual * * * shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year if—

* * * *

(2) his gross income from sources other than wages * * * can reasonably be expected to exceed \$100 for the taxable year and his gross income to be \$600 or more.

Subsection (d) of Section 58 (Appendix, *infra*) provides that the declaration required under subsection

¹³ The only contention of the Commissioner in the Tax Court relating to the year in which the loss was incurred was that the taxpayer had failed to prove that the loss was incurred in 1951. (Resp. Br. 25 filed in Tax Court.)

(a) must be filed on or before March 15 of the taxable year, except that if the taxpayer's expectation of earning gross income from sources other than wages exceeding \$100 and total gross income of \$600 or more does not occur until later in the taxable year he may file the declaration subsequent to March 15.

The taxpayer's return for the taxable year 1952 (Ex. 1-A) discloses a gross income from sources other than wages of \$44,464.65. Accordingly, it is clear that he was required to file a declaration for the year 1952. Moreover, the taxpayer did not contend in the trial court, nor does he contend before this Court, that he did not expect to earn gross income of more than \$100 from sources other than wages and total gross income of \$600 or more for the year 1952. Hence, the Tax Court's finding (R. 128-129) that gross income of more than \$100 from sources other than wages and total gross income of at least \$600 was reasonably expected in 1952 cannot be questioned. Furthermore, in view of the fact that the taxpayer's gross income for that year exceeded \$40,000, it is beyond a shadow of any doubt that the taxpayer must have known during that year that he would earn gross income in an amount which would require a declaration to be filed. Nevertheless, he never filed the required declaration.

Section 294(d)(1)(A) of the 1939 Code (Appendix, *infra*) provides that in the case of a failure to make and file a declaration of estimated tax *within the time* prescribed, an addition to tax is mandatory "unless such failure is shown to the satisfaction of

the Commissioner to be due to reasonable cause and not to willful neglect”.

The burden of establishing that the failure to file a return or a declaration was due to reasonable cause and not due to willful neglect is upon the taxpayer. *Lee v. Commissioner*, 227 F. 2d 181, 184 (C.A. 5th), certiorari denied, 351 U.S. 982; *Sanders v. Commissioner*, 225 F. 2d 629, 636 (C.A. 10th), certiorari denied, 350 U.S. 967; *Sabatini v. Commissioner*, 98 F. 2d 753, 756 (C.A. 2d). The question is one of fact, peculiarly within the province of the Tax Court and subject to the “clearly erroneous” rule. *Schmidt v. Commissioner* (C.A. 9th), decided November 7, 1958 (58-2 U.S.T.C., par. 9948); *Coates v. Commissioner*, 234 F. 2d 459, 462-463 (C.A. 8th); *Belser v. Commissioner*, 174 F. 2d 386, 391 (C.A. 4th), certiorari denied, 338 U.S. 893. The taxpayer does not carry this burden by merely showing an innocent mistake (*P. Dougherty Co. v. Commissioner*, 159 F. 2d 269, 273 (C.A. 4th), certiorari denied, 331 U.S. 838), or by showing that there was no willful neglect (*Schmidt v. Commissioner*, *supra*; *Lee v. Commissioner*, *supra*; *Calvert Iron Works, Inc. v. Commissioner*, 26 T.C. 770, 782), or by showing merely that he relied upon an accountant or an attorney for his tax matters (*Schmidt v. Commissioner*, *supra*; *Clark v. Commissioner*, 253 F. 2d 745, 751 (C.A. 3d); *Mayflower Investment Co. v. Commissioner*, 239 F. 2d 624, 627 (C.A. 5th); *Coates v. Commissioner*, *supra*; *Fides, A. G. v. Commissioner*, 137 F. 2d 731, 735 (C.A. 4th)), or by showing that he sincerely believed no return was due (*Henningsen v. Commis-*

sioner, 243 F. 2d 954, 958-959 (C.A. 4th); *P. Dougherty Co. v. Commissioner*, *supra*; *Sabatini v. Commissioner*, *supra*), or by his contention that the tax year in question was a complicated year and it was not known exactly what was owing (*Peebles v. Commissioner*, decided June 26, 1956 (1956 P-H T.C. Memorandum Decisions, par. 56,160), affirmed *per curiam*, 249 F. 2d 92 (C.A. 4th); cf. *C.V.L. Corp. v. Commissioner*, 17 T.C. 812, 816). The taxpayer must affirmatively show that the failure to file on time was due to reasonable cause and not to willful neglect. A showing of innocent mistake, or of one or more of the reasons just listed, merely indicates an absence of willful neglect but does not affirmatively establish reasonable cause.

It should be noted that the majority of the cases cited *supra* deal with the addition to tax imposed by Section 291 of the 1939 Code (26 U.S.C. 1952 ed., Sec. 291), which provides for an addition to tax in the case of a failure to file tax *returns*, except where "it is shown that such failure is due to reasonable cause and not due to willful neglect". However, the provision with which we are concerned in the present case (Sec. 294(d)(1)(A)) is much stricter and provides that reasonable cause must be shown "to the satisfaction of the Commissioner". It would appear, therefore, that where, as here, reasonable cause has not been shown to the satisfaction of the Commissioner, and the trial court finds as a fact that reasonable cause does not exist, the taxpayer must show not only that the decision below is clearly wrong but must also show that the Commissioner's action

was arbitrary and capricious. In any event, as we shall show, the record fully supports the trial court's findings. Concrete support for the Tax Court's findings is the fact that the taxpayer did not testify to any extent with respect to his contention that there was reasonable cause for the failure to file a declaration. (R. 36-105.) Without such testimony, the taxpayer could hardly have been held to have carried his burden.

However, there was some testimony dealing with other issues which disclosed that the taxpayer was involved in litigation which was concluded in the year 1950. (R. 95.) In addition to that the taxpayer's return for the year 1952 was signed by an accountant. (Ex. 1-A.) The taxpayer rests his case on these two items of evidence.

The taxpayer apparently argues (Br. 63) that the litigation which was terminated in the year 1950 (R. 118) gave rise to tax problems which caused him to believe he would earn no gross income for the year 1952, and therefore he filed no declaration. This contention is without merit. The taxpayer did not testify that the litigation caused his failure to file a declaration in 1952 and, therefore, his argument here has no record support. The litigation referred to is the Umpqua court proceeding (R. 95), as a result of which the taxpayer was awarded money. It seems obvious that that litigation, which was concluded in 1950, could have no bearing upon the question whether or not the taxpayer should have filed a declaration for the taxable year 1952. There is no

showing in this record as to how the litigation which was settled with respect to the taxpayer in 1950 could affect his tax picture for 1952. Moreover, the record does not even indicate whether that court proceeding resulted in a loss or in a gain to the taxpayer. Obviously, therefore, the taxpayer has not established any relation between the Umpqua litigation and his failure to file a declaration in 1952. Indeed, he does not claim that the Umpqua litigation caused him not to file a declaration in 1952; he merely points (Br. 63) to the facts just discussed and does not himself conclude from them that they constituted reasonable cause or caused his failure to comply with the law in 1952.

Section 58(a) of the 1939 Code is unambiguous and requires the filing of a deduction if there is an expectation of gross income other than from wages of more than \$100 and total gross income of at least \$600. This provision is crystal clear and it is general knowledge that the instructions given with the Form 1040 tax return contain those directions. Hence, even if it were shown that the Umpqua litigation of 1950 somehow caused the taxpayer's failure to file a declaration in 1952, it would still be hardly understandable how he, an attorney, could possibly have concluded that he would not earn the gross income which would require him to file a declaration. Indeed, on his 1951 return (Ex. P) the taxpayer requested that an alleged overpayment of tax be credited on the 1952 estimation, and that would indicate that he, as well as his accountant, expected that his gross income would be such that

he would be required to file a declaration for that year.

It seems clear that the taxpayer was either negligent or mistaken, but, as previously discussed, innocent mistake does not establish reasonable cause. Furthermore, the fact that a taxpayer has difficulties over his tax liability for previous years is hardly justification for a failure to comply with the law for a different year. *Glowinski v. Commissioner*, 25 T.C. 934, 936, affirmed *per curiam*, 243 F. 2d 635 (C.A. D.C.).

The taxpayer also apparently argues (Br. 63-64) that his failure to file a declaration was due to the error of his tax advisors. However, the stated defense is insufficient without proof as to the reasonableness of the reliance upon tax advisors (*Clark v. Commissioner*, 253 F. 2d 745, 751 (C.A. 3d); *United States v. Archer*, 174 F. 2d 353, 357 (C.A. 1st); *Fides, A.G., v. Commissioner*, 137 F. 2d 731, 735 (C.A. 4th))—there was no such proof in this case. Moreover, in order for the taxpayer's contention to constitute a defense it must at the very least be shown (1) that he relied upon the advisor's advice regarding the filing of the declaration, and (2) that the person relied upon had full knowledge of the facts so as to enable him to know whether or not the taxpayer was required to file a declaration. *Schmidt v. Commissioner* (C.A. 9th), decided November 7, 1958 (58-2 U.S.T.C., par. 9948); *Mayflower Investment Co. v. Commissioner*, 239 F. 2d 624, 627 (C.A. 5th); *Commissioner v. American Ass'n of Eng. Emp.*, 204 F. 2d 19, 21 (C.A. 7th); *Girard Inv. Co. v. Commis-*

sioner, 122 F. 2d 843, 848 (C.A. 3d), certiorari denied, 314 U.S. 699. The only evidence in this case on the question is the fact that an accountant who was a member of an accounting firm signed the taxpayer's tax return as the person who prepared it. (See Ex. 1-A.) This establishes nothing. It certainly does not establish that the taxpayer relied upon the accountant's advice not to file a declaration; indeed, it does not even show that such advice was given. We do not know whether it was the taxpayer who made the initial decision not to file the declaration in 1952, or whether it was the taxpayer's custom to rely upon his accountant to file his returns or declarations. In the absence of such evidence we must presume that it was the taxpayer who made the initial decision not to file a declaration in 1952 and that he did not rely upon his accountant to file his returns or his declarations. See *Schmidt v. Commissioner*, *supra*. Moreover, as previously noted, it is difficult to believe that the taxpayer, as an attorney who is at least generally familiar with the taxing statutes, or his accountant could possibly have concluded that the taxpayer would not have sufficient gross income so that he would not be required to file a declaration in 1952. Cf. *United States v. Archer*, *supra*, p. 357. The record also indicates that the accountant did not have sufficient information concerning facts affecting the taxpayer's tax picture. (R. 105.) In short, there is no evidence in the record upon which the taxpayer may rely to show that he carried his burden of proof in this case.

It should also be noted that so far as the record indicates the taxpayer never did file a declaration for 1952, late or otherwise, although he certainly knew during that year that he had sufficient gross income which would require him to do so. (R. 10, 128-129.) In view of that fact and the other factors discussed, it is inconceivable that the failure to file a declaration on time was due to reasonable cause.

As previously discussed, it is not necessary that there be facts which show willful neglect. The taxpayer has not shown that the Commissioner's belief that there was no reasonable cause was arbitrary or capricious, and he has not shown that the Tax Court's finding on this matter was clearly wrong.¹⁴ *Schmidt v. Commissioner, supra.*

¹⁴ The Tax Court also found (R. 129-130, 131) that the taxpayer was liable for additions to tax under Section 294 (d) (2) of the 1939 Code for the taxable years 1951 and 1952. The Tax Court's finding in that respect is not contested by the taxpayer on this appeal.

CONCLUSION

The Tax Court's decision is correct and should be affirmed.

Respectfully submitted,

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APRIL, 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions.

* * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

- (1) if incurred in trade or business; or
- (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft. No loss shall be allowed as a deduction under this paragraph if at the time of the filing of the return such loss has been claimed as a deduction for estate tax purposes in the estate tax return.

* * * *

(g) *Capital Losses.*—

- (1) *Limitation.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117.

* * * *

(i) *Basis for Determining Loss.*—The basis for determining the amount of deduction for losses sustained, to be allowed under subsection (e) or (f), and for bad debts, to be allowed

under subsection (k), shall be the adjusted basis provided in section 113(b) for determining the loss from the sale or other disposition of property.

* * * *

(k) *Bad Debts.*—

(1) [As amended by Sec. 124(a), Revenue Act of 1942, c. 619, 56 Stat. 798, and 113,(a), Revenue Act of 1943, c. 63, 58 Stat. 21] *General rule.*—Debts which become worthless within the taxable year; or in the discretion of the Commissioner) a reasonable addition to a reserve for bad debts; and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction. This paragraph shall not apply in the case of a taxpayer, other than a bank, as defined in section 104, with respect to a debt evidenced by a security as defined in paragraph (3) of this subsection. This paragraph shall not apply in the case of a taxpayer, other than a corporation, with respect to a non-business debt, as defined in paragraph (4) of this subsection.

* * * *

(4) [As added by Sec. 124(a), Revenue Act of 1942, *supra*,] *Non-business debts.*—In the case of a taxpayer, other than a corporation, if a non-business debt becomes worthless within the taxable year, the loss resulting therefrom shall be considered a loss from the sale or exchange, during the

taxable year, of a capital asset held for not more than 6 months. The term "non-business debt" means a debt other than a debt evidenced by a security as defined in paragraph (3) and other than a debt the loss from the worthlessness of which is incurred in the taxpayer's trade or business.

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) [As amended by Sec. 127(b), Revenue Act of 1942, *supra*] *General Rule*.—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23(x);

* * * *

(26 U.S.C. 1952 ed., Sec. 24.)

SEC. 58 [As amended by Sec. 13(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231].

DECLARATION OF ESTIMATED TAX BY INDIVIDUALS.

(a) [As amended by Sec. 202(a), Revenue Act of 1948, c. 168, 62 Stat. 110] *Requirement of Declaration*.—Every individual (other than an estate or trust and other than a nonresident alien with respect to whose wages, as defined in section 1621(a), withholding under Subchapter D of Chapter 9 is not made applicable) shall, at the time prescribed in subsection (d), make a declaration of his estimated tax for the taxable year if—

(1) his gross income from wages (as defined in section 1621) can reasonably be expected to exceed the sum of \$4,500 plus \$600 with respect to each exemption provided in section 25(b); or

(2) his gross income from sources other than wages (as defined in section 1621) can reasonably be expected to exceed \$100 for the taxable year and his gross income to be \$600 or more.

* * * *

(d) [As amended by Sec. 13(d), Individual Income Tax Act of 1944, *supra*] *Time and Place for Filing.*—

(1) *In general.*—The declaration required under subsection (a) shall be filed on or before March 15 of the taxable year, except that if the requirements of section 58(a) are first met

(A) after March 1 and before June 2 of the taxable year, the declaration shall be filed on or before June 15 of the taxable year, or

(B) after June 1 and before September 2 of the taxable year, the declaration shall be filed on or before September 15 of the taxable year, or

(C) after September 1 of the taxable year, the declaration shall be filed on or before January 15 of the succeeding taxable year.

* * * *

(26 U.S.C. 1952 ed., Sec. 58.)

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

* * * *

(26 U.S.C. 1952 ed., Sec. 111.)

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * *

(c) [As amended by Sec. 147, Revenue Act of 1942, *supra*] *Distributions in Liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. In the case of amounts distributed (whether before January 1, 1939, or on or after such date) in partial liquidation (other than a distribution to which the provisions of subsec-

tion (h) of this section are applicable) the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits. * * *.

(26 U.S.C. 1952 ed., Sec. 115.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions*.—As used in this chapter—

(1) [As amended by Sec. 210(a), Revenue Act of 1950, c. 944, 64 Stat. 906] *Capital assets*.—The term “capital assets” means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

* * * *

(d) [As amended by Sec. 150(c), Revenue Act of 1942, *supra*] *Limitation on Capital Losses*.—

(1) *Corporations*.—In the case of a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of gains from such sales or exchanges.

(2) *Other taxpayers*.—In the case of a taxpayer, other than a corporation, losses from sales or exchanges of capital assets

shall be allowed only to the extent of the gains from such sales or exchanges, plus the net income of the taxpayer of \$1,000, whichever is smaller. For purposes of this paragraph, net income shall be computed without regard to gains or losses from sales or exchanges of capital assets.

* * * *

(26 U.S.C. 1952 ed., Sec. 117.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

* * * *

(d) [As added by Sec. 118(a), Revenue Act of 1943, *supra*] *Estimated Tax*.—

(1) *Failure to file declaration or pay installment of estimated tax*.—

(A) *Failure to File Declaration*.—

In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. * * *.

* * * *

(26 U.S.C. 1952 ed., Sec. 294.)

2 Revised Code of Washington:¹⁵

Sec. 23.01.050 *Filing articles—Certificate of incorporation—Issuance.* (1) Triplicate originals of the articles of incorporation shall be delivered to the secretary of state. If the secretary of state finds that the articles of incorporation conform to law he shall put an endorsement of his approval upon each set, and when all taxes, fees and charges have been paid as required by law, he shall file one of such sets of articles in his office, and shall record the same, and shall issue a certificate of incorporation.

(2) Upon the issue of the certificate of incorporation, the corporate existence shall begin, and subject to the provisions of RCW 23.01.060, those persons who subscribed for shares prior to the issuance of the certificate of incorporation, or their assigns, shall be shareholders in the corporation.

(3) The certificate of incorporation together with the two remaining sets of the articles of incorporation bearing the endorsement of the

¹⁵ Eagle Timber, the corporate entity in question in this case, was incorporated under the provisions of the Revised Statutes of Washington and during the years that it was in existence those were the governing statutes. Sections 3803-5, 3803-7, 3803-8, 3803-9, 3836-13 and 3836-15 of 5 Remington's Revised Statutes of Washington Annotated, 1940 Annual Pocket Part, are substantially identical with Sections 23.01.050, 23.01.070, 23.01.080, 23.01.090, 23.60.140, and 23.60.150, respectively, of 2 Revised Code of Washington set out in this Appendix. Since the taxpayer relies (Br. 17-23) upon the provisions of the Revised Code in his brief, and since the applicable provisions of 5 Remington's Revised Statutes are substantially identical therewith, for the sake of simplicity we, likewise, refer to the provisions of the Revised Code in this brief.

fact and time of filing in the office of the secretary of state shall be returned to the incorporators or their representative. One of the sets of the articles of incorporation shall then be filed in the office of the auditor of the county in which the registered office of the corporation is situated, and the other shall be retained by the corporation.

Sec. 23.01.070. *Paid-in capital — Minimum.* The amount of paid-in capital with which a corporation may begin business shall not be less than five hundred dollars in cash or other property taken at a fair valuation.

Sec. 23.01.080 *Commencement of business — Prerequisites — Penalty.* (1) A corporation formed under this chapter shall not incur any debts or begin the transaction of any business, except such as is incidental to its organization or to the obtaining of subscriptions to or the payment for its shares, until:

(a) A triplicate original of the articles of incorporation has been filed in the office of the auditor as provided in RCW 23.01.050;

(b) the amount of paid-in capital with which it will begin business, as stated in the articles of incorporation, has been fully paid; and

(c) there has been filed in the office of the auditor of the county in which the corporation has its registered office an affidavit signed by at least a majority of the board of directors stating that the amount of paid-in capital with which it will commence business, as stated in the articles of incorporation, has been fully paid.

(2) If a corporation has transacted any business in violation of this section, the officers who participated therein and the directors, except

those who dissented therefrom and caused their dissent to be filed at the time in the registered office of the corporation, or who, being absent, so filed their dissent upon learning of the action, shall be severally liable for the debts or liabilities of the corporation arising therefrom.

Sec. 23.01.090. *Certificate evidence of incorporation.* The certificate of incorporation issued by the secretary of state in accordance with the provisions of RCW 23.01.050 shall be conclusive evidence of the fact that the corporation has been incorporated. Proceedings may, however, be instituted by the state to dissolve, wind up and terminate a corporation which should not have been formed under this chapter, or which has been formed without a substantial compliance with the conditions prescribed by this chapter as precedent to incorporation.

Sec. 23.60.140. *Dissolution for nonpayment of fees—Corporate name.* In the event that any corporation, which has failed to pay fees provided for by existing laws for a period of three consecutive years, shall fail to pay said fees in full on or before July 1, 1937, it shall be the duty of the secretary of state to enter upon his records a notation that such corporation is dissolved and said corporation shall thereupon be dissolved and the secretary of state shall thereupon be free to grant the name of the corporation so dissolved to any other corporation thereafter organized.

Sec. 23.60.150 *Dissolution for nonpayment—Trusteeship of assets.* In the event of dissolution of any corporation for the nonpayment of fees either by court action or otherwise the trustees of such corporation shall hold the title to

such property of the corporation for the benefit of its creditors and stockholders to be disposed of under appropriate court proceedings. Any unpaid balance of fees due the state of Washington shall remain and be a prior and preferred claim against said assets and be paid to the secretary of state before any payment to creditors and stockholders.

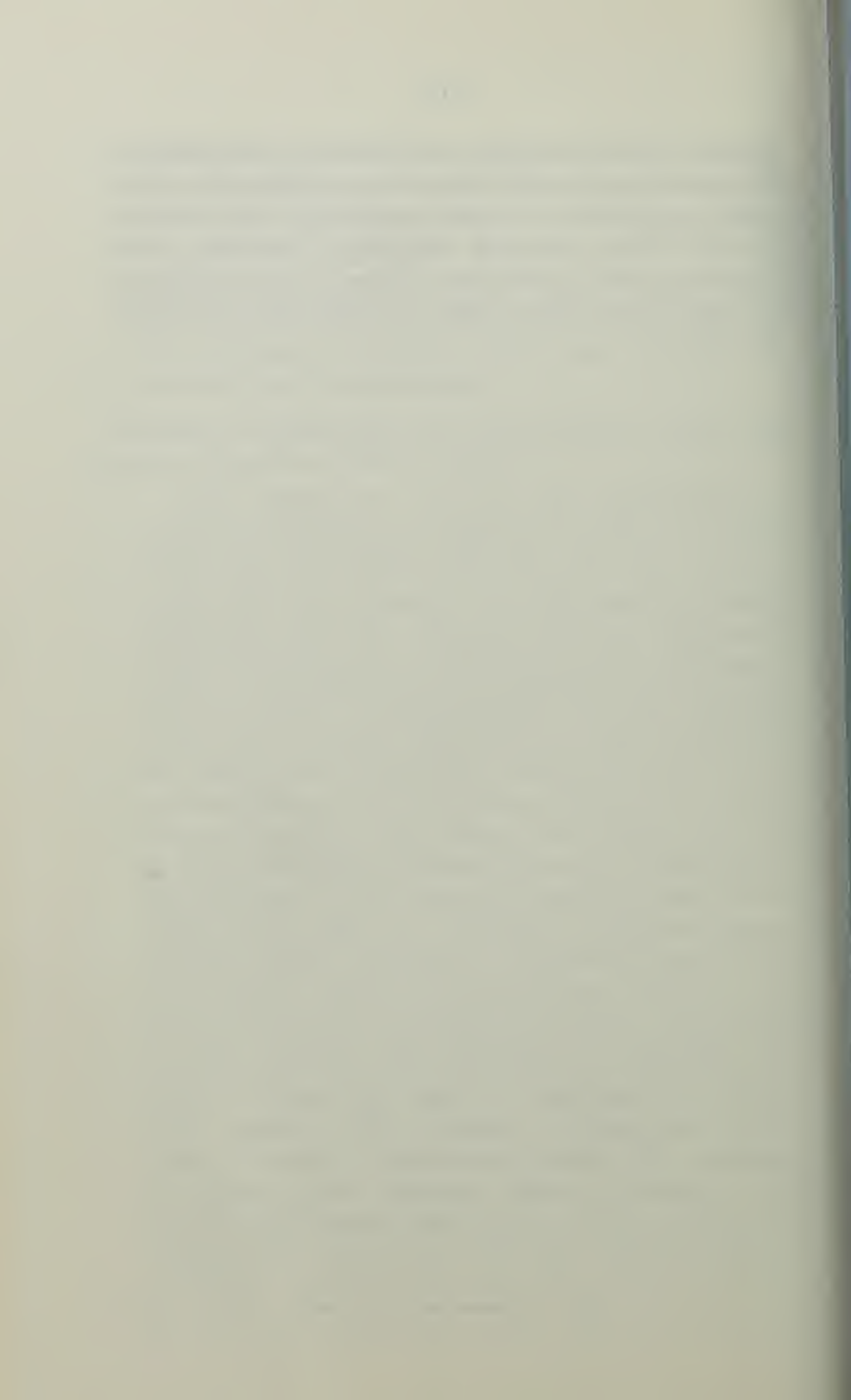
Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(e)-1. *Losses by Individuals.* — Losses sustained by individual citizens or residents of the United States and not compensated for by insurance or otherwise are fully deductible if (a) incurred in the taxpayer's trade or business, or (b) incurred in any transaction entered into for profit, or (c) arising from fires, storms, shipwreck, or other casualty, or theft, and a deduction therefor has not prior to the filing of the return been claimed for estate tax purposes in the estate tax return, or (d) if not prohibited or limited by any of the following sections of the Internal Revenue Code: Sections 23(g) and 117, relating to capital losses; section 23(h), relating to wagering losses; section 24(b), relating to losses from sales or exchanges of property between persons designated therein; section 112, relating to recognition of gain or loss upon sales or exchanges of property; section 118, relating to losses on wash sales of stock or securities; section 251, relating to income from sources within possessions of the United States; and section 252, relating to citizens of possessions of the United States.

* * *

* * * *

Section 39.23(e)-1(a) of Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939, applicable to years beginning after December 31, 1951, contains language identical with the above-quoted provisions of Treasury Regulations 111, applicable to the taxable year 1951 here involved.



No. 16041 ✓

United States
Court of Appeals
for the Ninth Circuit

CHARLES E. SMITH, Appellant,

VS.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the District Court for the Territory of
Alaska, Third Division

FILED

SEP 19 1958

PAUL P. O'BRIEN, CLERK

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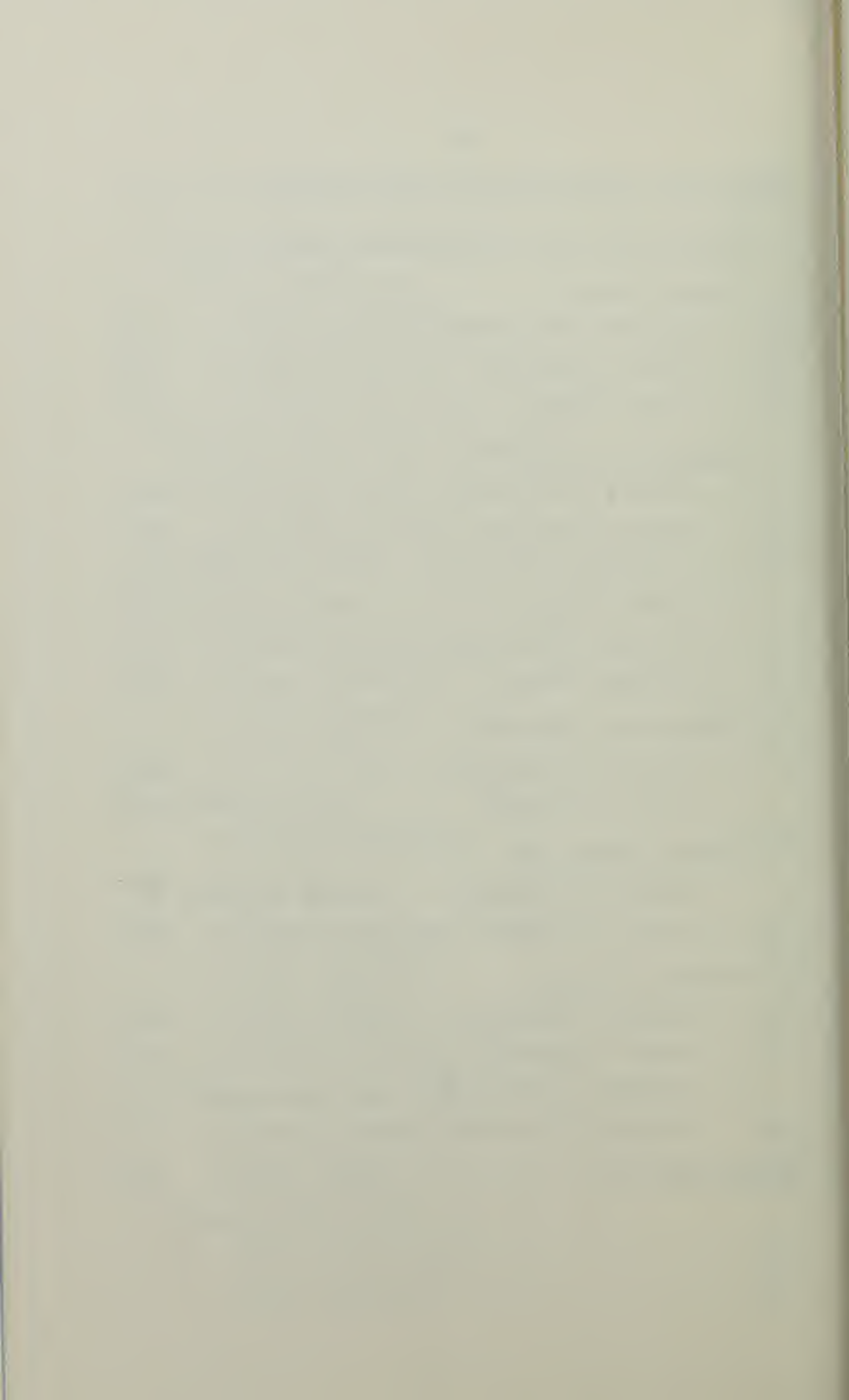
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In the District Court for the District
of Alaska, Third Division

Criminal No.

UNITED STATES OF AMERICA, Plaintiff,

vs.

JAMES BURTON ING, RAYMOND WRIGHT,
CHARLES E. SMITH, JOHN WALKER,
DEWEY TAYLOR and LEMUEL ASHLEY
WILLIAMS, Defendants.

INDICTMENT

Violation of Section 65-6-1, ACLA, 1949

The Grand Jury charges:

Count I.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously with intent to injure and defraud C. A. Peters, owner of the Fifth Avenue Cash Grocery, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9078.

This check not good for more than sixty days. Contract 1787. August 22, 1956.

Period ended 8/19/56. Pay to the Order of Wendell R. Ware, Badge No. 1177. Gross Earnings 236.00. Deductions: WT&FICA 26.20, A.U.C. 1.18, Alaska I.T. 3.15, B and L 28.00. Amount of check 177.47. The sum of \$177 and 47 cts. Morrison-Knudsen Company, Inc. by Guy M. King.

The First National Bank of Anchorage, 59-6, Anchorage, Alaska.

Countersignature required for amounts over three hundred dollars.

By endorsement of this check the undersigned acknowledges payment in full of all his claims and demands against Morrison-Knudsen Company, Inc. on account of labor performed to and including the period stated on the face of this check. Signed Wendell R. Ware. Pay to the Order of Bank of Alaska-155-Anchorage, Alaska. Fifth Avenue Cash Grocery, C. A. Peters.

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count II.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully, and feloniously with intent to injure and defraud the Kennedy Hardware, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, the owners of a

certain business enterprise, the Sport Shop, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8941. Contract 1787. August 22, 1956.

Period ending 8/19/56. Pay to the Order of Wendell R. Ware, Badge No. 1177. Gross Earnings 236.00. Deductions: WT&FICA 26.20, A.U.C. 1.18, Alaska I.T. 3.15, B and L 28.00. Amount of Check 177.47. The sum of \$177 and 47 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Wendell R. Ware. The Sport Shop, Box 1120, Anchorage, Alaska.

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count III.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously with intent to injure and defraud the Hub Clothing Company, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8833. Contract 1787, August 22, 1956.

Period ended 8/19/56. Pay to the Order of Wendell R. Ware. Badge No. 1177. Gross Earnings 236.00. Deductions: WT&FICA 26.20, A.U.C. 1.18, Alaska I.T. 3.15, B and L 28.00. Amount of Check 177.47. The sum of \$177 and 47 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Wendell R. Ware. Hub Clothing Co.

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count IV.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously with intent to injure and defraud the Union Club of Anchorage, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8895. Contract 1787, August 22, 1956.

Period ended 8/19/56. Pay to the Order of Wen-

dell R. Ware. Badge No. 1177. Gross Earnings 236.00. Deductions: WT&FICA 26.20, A.U.C. 1.18, Alaska I.T. 3.15, B and L 28.00. Amount of Check 177.47. The sum of \$177 and 47 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Wendell R. Ware. Bank Stamp: Union Club—Carlson. For deposit only.

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count V.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously with intent to injure and defraud Wallace Burnett and Helen Burnett, owners of The Club, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8965. Contract 1787. August 29, 1956.

Period Ended 8/26/56. Pay to the Order of Wendell R. Ware. Badge No. 1177. Gross Earnings 280.00. Deductions: WT&FICA 39.39, A.U.C. 1.40, Alaska I.T. 3.55, B and L 28.00. Amount of Check

207.26. The sum of \$207 and 26 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Wendell R. Ware. The Club. First National Bank of Anchorage. Helen Burnett.

The said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count VI.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud Dukal Enterprises, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, the owners of a certain business enterprise, the Hanover Gift Shop, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9089. Contract 1787. August 22, 1956.

Period ended 8/19/56. Pay to the Order of Thomas A. Brown. Badge No. 7134. Gross Earnings 280.00. Deductions: WT&FICA 30.70, A.U.C. 1.40, Alaska I.T. 3.55, B and L 28.00. Amount of Check 216.35. The sum of \$216 and 35 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Thomas A. Brown, Gen. Del. Anchorage. Deposit to Acct. of Dukal Enterprises Inc. CHK.

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count VII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud John D. Harris, owner of the Anchorage Liquor Store, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9005. Contract 1787. August 29, 1956.

Period ended 8/26/56. Pay to the Order of Thomas A. Brown. Badge No. 7134. Gross Earnings 280.00. Deductions: WT&FICA 30.70, A.U.C. 1.40, Alaska I.T. 3.55, B and L 28.00. Amount of Check 216.35. The sum of \$216 and 35 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Thomas A. Brown, Gen. Del. Anchorage. Anchorage Liquor Store. John D. Harris.

The said James Burton Ing, Raymond Wright

and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count VIII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud Wilma Jones and Cecil Jones, the owners of Hank's Hardware, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9008. Contract 1787. August 22, 1956.

Period ended 8/19/56. Pay to the Order of Thomas A. Brown. Badge No. 7134. Gross Earnings 280.00. Deductions: WT&FICA 30.70, A.U.C. 1.40, Alaska I.T. 3.55, B and L 28.00. Amount of Check 216.35. The sum of \$216 and 35 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Thomas A. Brown. Pay to the Order of Spenard Branch National Bank of Alaska of Anchorage. Hank's Hardware, For Deposit Only.

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count IX.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud C. T. Rewak, owner of Tom's Radio Service, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9073. Contract 1787. August 22, 1956.

Period ended 8/19/56. Pay to the Order of Thomas A. Brown. Badge No. 7134. Gross Earnings 280.00. Deductions: WT&FICA 30.70, A.U.C. 1.40, Alaska I.T. 3.55, B and L 28.00. Amount of Check 216.35. The sum of \$216 and 35 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Thomas A. Brown. For Deposit Only. Tom's Radio Service, Anchorage, Alaska.

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count X.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond

Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent to injure and defraud Robert W. Stratton, Jr., owner of Stratton's Gateway Service, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. (Illegible). Contract 1787. August 29, 1956.

Period Ended 8/26/56. Pay to the Order of Thomas A. Brown. Badge No. 7134. Gross Earnings 280.00. Deductions: WT&FICA 30.70, A.U.C. 1.40, Alaska I.T. 3.55, B and L 28.00. Amount of Check 216.35. The sum of \$216 and 35 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Thomas A. Brown, Gen. Del. Anchorage. Pay to the Order of City National Bank of Anchorage, Anchorage, Alaska. For Deposit Only. Stratton's Gateway Service, Robert Stratton.

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count XI.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously with intent

to injure and defraud Roy McKay, owner of McKay's Hardware, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9077. Contract 1787. August 29, 1956.

Period Ended 8/26/56. Pay to the Order of Thomas A. Brown. Badge No. 7134. Gross Earnings 280.00. Deductions: WT&FICA 30.70, A.U.C. 1.40, Alaska I.T. 3.55, B and L 28.00. Amount of Check 216.35. The sum of \$216 and 35 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Thomas A. Brown. McKay's Hardware.

The said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count XII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods, did wilfully, unlawfully and feloniously with intent to injure and defraud Thomas B. Waters, owner of the Frontier Loan Company, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8903. Contract 1787. August 29, 1956.

Period ended 8/26/56. Pay to the Order of James C. Woods. Badge No. 6840. Gross Earnings 280.00. Deductions: WT&FICA 27.60, A.U.C. 1.40, Alaska I.T. 3.54, B and L 28.00. Amount of Check 219.46. The sum of \$219 and 46 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: James C. Woods. Initialed: F.E.G. 4/4/56, T.B.W.

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XIII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud Sonja Davis and Walter Davis, owners of the Davis Liquor Store, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9012. Contract 1787. August 21, 1956.

Period Ended 8/19/56. Pay to the Order of James C. Woods. Badge No. 6840. Gross Earnings 280.00. Deductions: WT&FICA 27.60, A.U.C. 1.40, Alaska I.T. 3.54, B and L 28.00. Amount of Check 219.46. The sum of \$219 and 46 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: James C. Woods. Davis Liquor Store, 236 Fourth, Anchorage, Alaska. By Sonja Davis.

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XIV.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud Robert J. Shimek and Violet D. Shimek, owners of the Record Shop, The Radio-TV Center, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8973. Contract 1787. August 29, 1956.

Period Ended: 8/26/56. Pay to the Order of

James C. Woods. Badge No. 6840. Gross Earnings 280.00. Deductions: WT&FICA 27.60, A.U.C. 1.40, Alaska I.T. 3.54, B and L 28.00. Amount of Check 219.46. The sum of \$219 and 46 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: James C. Woods. For Deposit Only. The First National Bank, The Record Shop, The Radio-TV Center.

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XV.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud George J. Cox and James La-Bounty, owners of the City Service, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8977. Contract 1787. August 15, 1956.

Period ended 8/12/56. Pay to the Order of James C. Woods. Badge No. 6840. Gross Earnings 280.00. Deductions: WT&FICA 27.60, A.U.C.

1.40, Alaska I.T. 3.54, B and L 28.00. Amount of Check 219.46. The sum of \$219 and 46 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: James C. Woods. Pay to the Order of National Bank of Alaska in Anchorage, Anchorage, Alaska, City Service.

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XVI.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud Benny Leonard and Mary Leonard, owners of Leonard's Varieties, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9065. Contract 1787. August 29, 1956.

Period ended 8/26/56. Pay to the Order of James C. Woods. Badge No. 6840. Gross Earnings 280.00. Deductions: WT&FICA 27.60, A.U.C. 1.40, Alaska I.T. 3.54, B and L 28.00. Amount of Check 219.46. The sum of \$219 and 46 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: James C. Woods. NK 254-05-4726.
Leonard's Varieties, Box 2279, Anchorage, Alaska.

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XVII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud H. I. Stewart and Oro Stewart, owners of the Stewart's Photo Shop, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 9051. Contract 1787. August 29, 1956.

Period ended 8/26/56. Pay to the Order of James C. Woods. Badge No. 6840. Gross Earnings 280.00. Deductions: WT&FICA 27.60, A.U.C. 1.40, Alaska I.T. 3.54, B and L 28.00. Amount of Check 219.46. The sum of \$219 and 46 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: James C. Woods. Pay to the Order of The First National Bank, Anchorage, Alaska. For Deposit Only. Stewart's Photo Shop, Anchorage, Alaska.

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XVIII.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods did wilfully, unlawfully and feloniously with intent to injure and defraud John D. Harris, owner of the Anchorage Liquor Store, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. (Illegible). Contract 1787. August 29, 1956.

Period Ended 8/26/56. Pay to the Order of James C. Woods. Badge No. 6840. Gross Earnings 280.00. Deductions: WT&FICA 27.60, A.U.C. 1.40, Alaska I.T. 3.54, B and L 28.00. Amount of Check 219.46. The sum of \$219 and 46 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: James C. Woods. Anchorage Liquor Store, John D. Harris.

The said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XIX.

On or about the 1st day of September, 1956, at or near Anchorage, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams did wilfully, unlawfully and feloniously with intent to injure and defraud John D. Harris, owner of the Anchorage Liquor Store, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc., General Contractors, Boise, Idaho. Pay Check No. 8927. Contract 1787. August 29, 1956.

Period Ended 8/26/56. Pay to the Order of Theodore Williams. Badge No. 6969. Gross Earnings 270.00. Deductions: WT&FICA 19.50, A.U.C. 1.35, Alaska I.T. 3.38, B and L 28.00. Amount of Check 217.87. The sum of \$217 and 87 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Theodore Williams, 410 8th. Anchorage Liquor Store. John D. Harris.

The said James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams well knowing at the time that the check was false and forged.

Count XX.

On or about the 1st day of September, 1956, at or near Mile 113, Glenn Highway, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams did wilfully, unlawfully and

feloniously with intent to injure and defraud Gertrude Jurgeleit and Oscar Jurgeleit, owners of the Sheep Mountain Lodge, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check of the following-described tenor and purport:

Morrison-Knudsen Company, Inc. General Contractors, Boise, Idaho. Pay Check No. 8924. Contract 1787. August 29, 1956.

Period Ended 8/26/56. Pay to the Order of Theodore Williams. Badge No. 6969. Gross Earnings 270.00. Deductions: WT&FICA 19.50, A.U.C. 1.35, Alaska I.T. 3.38, B and L 28.00. Amount of Check 217.87. The sum of \$217 and 87 cts. Morrison-Knudsen Company, Inc. By Guy M. King.

* * * * *

Endorsed: Theodore Williams, 410 8th. Tues. Morning—6:30 A.M. Going to Valdez with (illegible) driver. Blk 53 Buick Sdn.

The said James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams well knowing at the time that the check was false and forged.

A True Bill.

/s/ HAROLD STRANDBERG,
Foreman.

/s/ WILLIAM T. PLUMMER,
United States Attorney.

Witnesses examined before the Grand Jury: T. E.

Pass, Dewey Taylor, Charles E. Smith, John Walker, Lemuel Williams, Raymond Wright, Virginia Shields, Carl R. Berlin, Henry Futor, Ivan S. Barton, Helen M. Burnett, Charles N. Knuth, John D. Harris, Mabel Rewak, George C. Wilmoth, Roy McKay, Thomas B. Waters, Darleen R. Ramussen, Benny L. Leonard, William J. Gordon, Jim LaBounty, Joseph Turgeon, Gertrude Jurgeleit, Roy B. Johnson, Jr., Russell Hobbs, Gladys Faye Berry.

United States of America,
Territory of Alaska,
Third Division—ss.

I, The Undersigned, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that this is a true and full copy of an original document on file in my office as such clerk.

Witnessed my hand and the Seal of said Court this 20th day of May, 1958.

[Seal]

WM. A. HILTON,

Clerk of the District Court.

s/ By JO ANN MYRES,
Deputy.

[Title of District Court and Cause.]

PLEA OF NOT GUILTY AND SETTING
TIME FOR TRIAL

(Charles E. Smith)
(Counts 1 through 5)

Before the Honorable J. L. McCarrey, Jr., District Judge.

Now on this 6th day of November, 1957, came Wm. T. Plummer, United States Attorney, came also the defendant Charles E. Smith in person, and represented by his counsel Buell Nesbett and said defendant having heretofore and on the 5th day of November, 1957, been duly arraigned, announced to the Court that he is ready to enter his plea herein, is asked by the Court if he is guilty or not guilty of the crime charged against him in the indictment, to wit: Uttering a forged instrument, to which defendant says he is not guilty and therefore puts himself upon the Country, and the United States Attorney, for and in behalf of the Government, does the same.

Whereupon, respective counsel consenting, the Court set this cause for trial at 10:00 o'clock A.M. of Monday, March 3, 1958.

Entered Journal No. J-55, Page No. 313, November 6, 1957.

[Title of District Court and Cause.]

VERDICT NO. 3

We, the jury, duly impaneled and sworn to try the above-entitled case, do find the defendant, Charles E. Smith, guilty of the crime charged in Count I of the indictment;

And we do further find the defendant not guilty of the crime charged in Count II of the indictment;

And we do further find the defendant guilty of the crime charged in Count III of the indictment;

And we do further find the defendant guilty of the crime charged in Count IV of the indictment;

And we do further find the defendant guilty of the crime charged in Count V of the indictment.

Dated at Anchorage, Alaska, this 28th day of Feb., 1958.

/s/ HADLEY H. SULLIVAN,
Foreman.

Entered Journal No. J-57, Page No. 391, Feb. 28, 1958.

[Endorsed]: Filed February 28, 1958.

United States District Court for the
District of Alaska, Third Division

No. CR 3772

UNITED STATES OF AMERICA, Plaintiff,

vs.

CHARLES EDWARD SMITH, Defendant.

JUDGMENT AND COMMITMENT

On this 3rd day of March, 1958, came the attorney for the government and the defendant appeared in person and by counsel, Buell A. Nesbett, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of forgery in violation of Section 65-6-1 ACLA 1949 as charged in Counts I, III, IV, and V of the Indictment on file herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years on each of Counts I, III, IV, and V, said sentence imposed on Counts

III, IV, and V to run concurrently with said sentence imposed on Count I, said sentence to commence and begin on the 3rd day of March, 1958.

It Is Adjudged that execution of Two (2) years of said sentence of imprisonment is hereby suspended on the condition that the defendant make full restitution on or before the 3rd day of September, 1958.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done in open Court this 3rd day of March, 1958,
at Anchorage, Alaska.

/s/ J. L. McCARREY, JR.,
United States District Judge.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed March 3, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant—Charles E. Smith, c/o Morrison-Knudsen Company, Fairbanks, Alaska.

Appellant's Attorney: Buell A. Nesbett, Suite 7, First National Bank Building, Anchorage, Alaska.

Offense: Uttering and publishing as true and genuine forged checks as listed in Counts 1, 3, 4

and 5 of the indictment herein pursuant to jury verdict dated February 28, 1958, with findings of "guilty" as to each of the Counts above mentioned, and sentence of this Court dated March 3, 1958, sentencing this Appellant to serve five years on each of counts 1, 3, 4 and 5 to run concurrently, two years of said sentence on each count to be suspended conditional on making restitution by September 3, 1958.

This Appellant has been at liberty on \$2,500 cash bail.

I, the above named Appellant, hereby appeal to the U. S. Court of Appeals for the Ninth Circuit from the above named judgment and sentence.

Dated at Anchorage, Alaska, this 3rd day of March, 1958.

/s/ CHARLES E. SMITH,
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 3, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The following statement of points upon which the appellant Charles E. Smith intends to rely on appeal is submitted in accordance with Rule 75(d) Federal Rules of Civil Procedure and Rule 39 (b) (1) Federal Rules Criminal Procedure:

1. The trial Court erred in admitting the testimony of M. E. Dankworth, Territorial Police Officer, containing admissions made by Appellant while in custody without first holding a private hearing to determine whether the admissions had been voluntarily made. Such a hearing was denied.

2. The trial Court erred in admitting the testimony of M. E. Dankworth, Territorial Police Officer, containing admissions made by Appellant while still in the same custody and under the same pressures that existed when his confession was illegally obtained, the admissions containing the same information as the confession which was held to be inadmissible because taken before prompt arraignment, upon promises of leniency and during a time when appellant was prevented from seeing his attorney.

3. The trial Court erred in refusing to instruct the jury that the admissions of Appellant while in custody testified to by M. E. Dankworth, must have been voluntarily made.

4. That the trial Court erred in refusing to strike the testimony of the witness M. E. Dankworth pursuant to timely motion by appellant.

5. That the U. S. Attorney committed reversible error in commenting on the failure of the Appellant to take the witness stand and the trial Court erred in failing to properly instruct the jury after the U. S. Attorney's comments.

6. That the trial Court erred in refusing to per-

mit Appellant to inspect the confession taken from him prior to its attempted introduction into evidence during the course of the trial.

Dated at Anchorage, Alaska this 11th day of March, 1958.

/s/ BUELL A. NESBETT,
Attorney for Appellant,
Charles E. Smith.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 11, 1958.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Pursuant to Rule 39(b)(1) Federal Rules Criminal Procedure and Rule 75(a) Federal Rules Civil Procedure the following contents are designated by the appellant Charles E. Smith.

1. Reporter's transcript of the testimony of the witnesses: Virginia Shields, Henry Futor, Ivan Barton, Helen Burnett, Edward Harkabus, James H. Barkley, Earl Hibpschman, James Chenoweth, Stanley Laird, Charles E. Smith, M. E. Dankworth, Lois Bradley.

2. Reporter's transcript of all motions made by Attorney, Buell A. Nesbett on behalf of the appellant, Charles E. Smith, and arguments made concerning the motions by Appellant Smith's counsel or the Government and rulings by the Court.

3. All arguments made by any of counsel for the defense and Government concerning the admissibility of the testimony of Edward Harkabus, M. E. Dankworth or the Government's Exhibit 20 for identification and rulings.

4. Government's Exhibit 20 for identification.

5. Reporter's transcript of all proceedings concerning and the testimony of the defendant Charles E. Smith.

6. Government's Exhibit XXIII for identification.

7. Reporter's transcript of motion for acquittal Charles E. Smith and Court's ruling.

8. Motion to strike testimony of E. M. Dankworth, arguments thereon and ruling.

9. Motion to produce documents at commencement of trial and arguments and ruling thereon.

10. Reporter's transcript of U. S. Attorney's Closing Argument, last portion only.

Dated at Anchorage, Alaska, this 11th day of March, 1958.

/s/ BUELL A. NESBETT,
Attorney for Appellant,
Charles E. Smith.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 11, 1958.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Wm. A. Hilton, Clerk of the above entitled court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure, I am transmitting herewith the Original Papers in my office dealing with the above entitled action or proceeding, as designated by counsel for defendant-appellant, together with the following:

1. Indictment.
2. Plea.
3. Verdict.
4. Judgment.
5. Notice of Appeal.
6. Statement of Points.
7. Designation.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from Judgment filed and entered in the above entitled cause by the above entitled court on the 3rd day of March, 1958.

Dated at Anchorage, Alaska, this 21st day of May, 1958.

[Seal] /s/ WM. A. HILTON,
 Clerk.

In the District Court for the District
of Alaska, Third Division

Cr. No. 3772

UNITED STATES OF AMERICA, Plaintiff,

vs.

JAMES BURTON ING, RAYMOND WRIGHT,
CHARLES E. SMITH, JOHN WALKER,
DEWEY TAYLOR, and LEMUEL ASHLEY
WILLIAMS, Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable J. L. McCarrey, Jr.,
U. S. District Judge.

Anchorage, Alaska, February 18, 1958, 4:00
o'clock p.m.

Appearances: For the Plaintiff: William T. Plummer, United States Attorney, Federal Building, Anchorage, Alaska. For the Defendant Ing: Wendell P. Kay, Attorney at Law, 604 Fourth Avenue, Anchorage, Alaska. T. N. Gore, Attorney at Law, 320 Chena Building, Fairbanks, Alaska. For the Defendant Smith: Buell A. Nesbett, Attorney at Law, First National Bank Building, Anchorage, Alaska. [1]*

Proceedings

The Court: Counsel for the defendant Ing and

* Page numbers appearing at bottom of page of Reporter's Original Transcript of Record.

counsel for the defendant Smith have ex-parte filed certain motions in the case of United States of America, Plaintiff, vs. James Burton Ing, et al., Defendants, Criminal No. 3772. I presume counsel for the Government has had an opportunity to consider these motions in preparation for the argument?

Mr. Plummer: Yes, your Honor. I don't believe I have the—yes, I do, your Honor, and I had a chance to inspect them.

The Court: Now, could I ask your position, Mr. Plummer, as to the request of Charles E. Smith. Do you have any objection to him having a copy of his statement?

Mr. Plummer: Yes, your Honor. I resist that as well as the motion made by Mr. Ing.

The Court: Well, then the court will hear you in argument. You may proceed first, Mr. Kay, since you filed your motion first.

Mr. Kay: Thank you, your Honor. Your Honor, Mr. Plummer: Of course, our motion is for the inspection and the opportunity to copy this pre-trial statement made by the defendant Ing based upon the Federal Rules of Criminal Procedure, Rule 16, which similar provisions, and, in fact, unfortunately much stronger provisions exist in many of the state rules of procedure.

I want to be perfectly frank with the Court and say right off hand there have been several federal decisions which are cited [3] in Barron and Holtzoff which have held that the defendant under these circumstances did not have the right to require—

against the Government opposition that he be given an opportunity to inspect his pre-trial statement. I want to say at the same time that, in my opinion, the Court of Appeals for the Ninth Circuit has indicated in the case of *Monroe vs. United States* that if this same motion were to come before them that such a motion would be granted. I want to refer your Honor to the case of *Monroe vs. United States*, Court of Appeals for the Ninth Circuit, decided in 1946. The citation is 234 F 2d 49. Barron and Holtzoff cites that case in the supplement as follows: Under Rule 16, "In prosecution for conspiracy to bribe police officer and bribery itself could properly request pre-trial inspection of recordings of conversations between the police officer and defendants, and trial court in its discretion could have required pre-trial production of such recordings, but trial court did not abuse its discretion in denying such requests, where defendants had already been accorded opportunity by Government to inspect the recordings." In other words, the court said——

The Court: That is that case?

Mr. Kay: That is the *Monroe* case, yes, your Honor. The court said while in our opinion it is a matter of vast discretion of the trial judge and while we can't say that the trial judge abused his discretion in denying this request, he wouldn't have abused his discretion in granting it and he didn't abuse his [4] discretion in denying it where the Government had already afforded the defendant an opportunity to inspect and copy the document, and

so I think that clearly under the circumstances of that case, if no such opportunity had been afforded, already been afforded by the Government, that the Ninth Circuit would have, in my opinion, and I think if your Honor will examine the language of the opinion of the Ninth Circuit, you will find it would have held it abusive discretion under the circumstances where nothing substantial appears why the defendant should be denied that right; they would have held that abusive discretion to deny it.

Now, your Honor, I'd also like to cite—I want to say, of course, it isn't a Federal Rules of Civil Procedure citation, but it is a most influential and because of the language and reasoning of the Supreme Court of California in the case of *Powell vs. Superior Court of California*, 312 F. 2d 698—I mis-cited it in my memorandum as being page 701. It is not. It is page 698—the language of the court is, if I may be permitted, so reasonable, so cogent I'd like to quote just a paragraph of it.

The Court: Pardon me. It's hard for me to see how you can cite a civil case.

Mr. Kay: It's a criminal case, your Honor. What I am saying is, it is not under the Federal Rules of Criminal Procedure. It is under similar rule in California in the California State Court. "In the circumstances of the present case, to deny inspection of defendant's statements would likewise be to lose [5] sight of the objective of ascertainment of the facts, and would be out of harmony with the policy of this state that the criminal prosecutions is not to secure a conviction in every case

by any expedient means, however odious, but rather, only through establishing the truth upon a public trial fair to the defendant and state alike," and they go on to point out here the defendant has made a statement to deny him the opportunity to inspect it prior to trial for the purpose of refreshing his recollection as to what he said a year ago is ridiculous when you deny that right to no other witness in the case. Every other witness in the case, of course, is afforded — both for the Government and for the defense would be accorded the right to examine a statement and would probably have been furnished a copy of it at the time and would have had an opportunity to refresh his recollection by examining it. Why should there be any different ruling with regard to the defendant?

The Court: May I hear you on this other point, counsel, that is, you say there are some Supreme Court cases which have denied——

Mr. Kay: No. No Supreme Court cases, your Honor. There are other federal cases from other circuits which are cited in Barron and Holtzoff.

The Court: Which hold it cannot. Can you explain those away?

Mr. Kay: Well, all I can say is that they take one [6] view of Rule 16 and in my opinion the Court of Appeals for the Ninth Circuit takes a different and correct view. It is perfectly possible to interpret Rule 16 as they do by staying with the strict wording view of the language. The language is that a defendant can properly obtain for inspection and copy books, papers, documents or tangible

objects obtained from or belonging to the defendant. That is the language. You can obtain those designated books, papers, documents or tangible objects.

The Court: Pardon me. Did you consider that his statement was his own property?

Mr. Kay: I certainly would say that it is just as much his property as any other of these documents that could be obtained from him.

The Court: Well, aren't you stretching it a little bit when you state that because a person might have a wallet or a passport and those matters may have been obtained from the defendant through search warrant or otherwise, and I can well understand how the title to that would never pass to the Government, but now the statement is something different.

Mr. Kay: Suppose he has a letter in his possession that came from somebody else?

The Court: That is his.

Mr. Kay: Or other property not belonging to him, just happened to be in his possession at the time he was arrested and ceased and he wants to see that prior to trial? What I say, [7] your Honor, is that it takes a very strict view of that rule to say that a statement voluntarily given by a man in the presence of an officer of the law and immediately by them reduced to writing is not obtained from him, when, if he carried the same statement on a piece of paper in his pocket, it would be something obtained from him. I say they are both obtained from him and that he is equally entitled—

should be equally entitled to have the production required; however, I'd like to point out again this is almost completely a matter of discretion of the trial court itself, whether the trial court feels it would be fair or not to permit the defendant to examine the particular paper.

The cases that I referred to your Honor were not even Circuit Court opinions. They were two District Court opinions, 17 FRD 365 and one in 6 FRD 270 holding that under similar circumstances that production of the particular statement as having been in an oral form, neither tape recorded or reduced to writing, later would not be required. I think, however, I feel confident, your Honor, if you will examine the language of the Court of Appeals of the Ninth Circuit, the Monroe case, that you will agree that under the circumstances in this case the court would not be abusing its discretion; in fact, would be wisely using its discretion if Ing would be permitted to examine his pre-trial statement.

The Court: Mr. Nesbett, may I hear you at this time on this same point?

Mr. Nesbett: Your Honor, I appreciate my motion being [8] heard along with Mr. Kay. I only filed it a matter of minutes ago. I subscribe to the argument as cited by Mr. Kay. Briefly, I want to be heard on what I consider to be the fairness of the rule and that is this: Your Honor will note from the experience that your Honor has had on the bench with respect to these cases that when a man is arrested and questioned by officers he is under a certain pressure. The object of the officers, no doubt

it is their duty, is to get, if possible, a statement or a confession from the person accused. There are rules surrounding the conduct that must govern him in doing that and I have no quarrel at this time with that. But here is what I want to point out: The accused is under the constant pressure to give a statement. There is no question but what if the defendant or the accused said, "I will give a statement, but I want a copy of that to keep for my own files" the officer would say, "Why, of course, we will give it to you." But, your Honor, once they receive that statement it becomes sacred, it becomes something secret, it becomes something they want to put in their files and keep there and not disclose it or any part of it to the defendant himself, if he is later charged with a crime, until the day of the trial.

Your Honor, I submit that the whole theory of pleading and practice these days is to do away with surprises and your Honor very well knows that with the rules of discovery that would follow in civil practice. Why then, particularly in view of the wording of a rule as strong as Rule 16, should the Government be permitted [9] to maintain what might possibly be a surprise in store for the defendant as the trial day approaches?

Now here in this case we have reason to believe that the Government has a statement. I fully have reason to believe that Smith gave a statement. He doesn't have the faintest idea what was put in that statement.

The Court: Pardon me. Is there any doubt in your mind that he gave a statement?

Mr. Nesbett: Well, he believes that he did. I have said so in the affidavit.

The Court: But did he sign a statement?

Mr. Nesbett: He says he signed a statement or something that he believes to be a statement. As a matter of fact, your Honor, he believes that the statement said, "This statement can't be used against me", and that Harkabus wrote it out in his handwriting. That surprises me. It puzzles me. I don't know what to think and the trial commences tomorrow morning. I'd like to see that statement if there is such a statement. Mr. Plummer certainly could clear that up in his argument.

The Court: Of course, you surprise the court by saying there is a doubt in your mind there was a statement given.

Mr. Nesbett: All I know is what I am told, your Honor, by the defendant as to what occurred in the Seattle jail over a year ago under circumstances of pressure as pointed out. If there is no statement, fine, but I do believe there is. I have [10] every reason to believe there is.

Now, your Honor, why, in all fairness shouldn't the defendant be allowed to see what is in that statement that he signed his name to a year ago now? Why is it so sacred? Why should it be kept secret in the Government files to be brought out only at the time of the trial? I can't see it. In all fairness and in view of the strong wording of Rule 16 and the authority cited by Mr. Kay it just isn't fair. It isn't in line with what we would call a rule of fairness in our criminal practice. We have broad

liberal rules of discovery in civil procedure. Why then should something like this be permitted in criminal procedure where the rights of the defendant are being protected? This is his own statement. He would only like to see it before he goes to trial. But, no, it won't be divulged until they get ready to divulge it. Your Honor, that isn't fair.

That is all I have to say on it.

The Court: Now, Mr. Kay, I'd like to hear you on your other motion, that is, for separate trial.

Mr. Kay: May I add one point on the motion I have just argued, your Honor, and that is this: That if your Honor will read Sections 2031 and 2032 of Barron and Holtzoff you will find the learned authorities of this treatise, one of whom I believe is now on the Federal Bench, are fully in accord with the belief and believe that the rules should extend to exactly what we have requested in this case. Now, to comment on the unfairness [11] of the narrowness of the interpretation of the rule that has occurred in several of the district courts. I want to say that the authors are one hundred percent—if they were here they would be joining in the argument for the defense. All you have to do is examine the paragraph to see the way they feel about it.

Now, as to the motion for separate trial.

* * * * *

The Court: Very well. Mr. Plummer. Would you restrain yourself to the question of inspection and/or photographing of the statements of the two

defendants before proceeding to the other subject, please.

Mr. Plummer: Yes, your Honor.

Mr. Kay advised the court about Section 2301 of Barron and Holtzoff which is found, I believe, on page 125 in Volume 4. It goes on for most of the paragraph telling what the advisory committee made in their early stages, but then if you will read the last sentence it says, "But, nevertheless, the committee in its final draft struck all reference to matter not privileged and restricted discovery in behalf of the defendant as heretofore indicated," which is the statement given in the first couple of sentences of the paragraph of 2301. So no matter what they feel that the law should be, there is no doubt in their minds about what the law is and what the law is is what the cases say it is under there—under the motion.

I call your Honor's attention to Rule 16. It provides for [12] documents or tangible objects obtained from or belonged to the defendant or obtained from others by seizure of process.

The Court: Now, what have you to say on the question I asked Mr. Kay? Do you consider that a statement made by a witness or a defendant the property of that defendant and/or witness?

Mr. Plummer: Absolutely not and neither do the cases. The cases without fail hold that a statement taken from a defendant is not his property. I will cite just a few to your Honor. *United States vs. Kiamie*, 18 FRD 421, which in that particular case, on the particular facts of reason, was that the state-

ment taken from the defendant were not objects or anything belonging to him. This is the rational of a whole line of cases. *United States vs. Louie Gim Hall*, 18 FRD 384. There is a very learned discussion of the early decisions under the Federal Rule 16 in *United States vs. Peltz*, very thorough discussion. That is found at 18 FRD 394. There is also a very complete discussion in *Shores vs. United States*, 174 F. 2d 838. And in all cases, without qualification, they hold that the statement taken from the defendant is not within the purview of Rule 16.

This California case that Mr. Kay cites——

The Court: Pardon me. That last one is 174 F. 2d 83——

Mr. Plummer: 8. One of the early cases under Rule 16 and it has a very complete discussion of the case and I think it goes on for about two pages there on this particular point, your [13] Honor; very good discussion. They hold in there, of course, that the defendant is not entitled to inspect.

To get back to Mr. Kay's point about this California case. Of course, the difficulty is that this is not being brought under California law. The motion is filed under Rule 16 and the facts are somewhat different even in the case that Mr. Kay has mentioned and in the present case. In the California case, in the *Powell* case, one of the difficulties was that, supposedly that the defendant couldn't remember what he said to tell the attorneys what was said. In this particular case Mr. Kay and Mr. Gore

were in the room right at the time that the statement was given.

The Court: Now, that is as to Mr. Ing. How about as to Mr. Smith?

Mr. Plummer: I am sure Mr. Nesbett was not even employed at that time but it wouldn't make any difference. I am merely distinguishing the California case from the present facts even though it has no application because it was not decided under Rule 16, and there is just a host of authority, your Honor, with very few authority to the contrary, that a statement taken from a defendant is not his property within the phraseology and the meaning and the understanding of Rule 16 of the Federal Rules of Criminal Procedure.

The Court: All right. Now, I have your argument on that point. Could we get then to your position as to Mr. Nesbett's principal point, that is, of fairness to the [14] defendant.

Mr. Plummer: Well, I believe, your Honor, that we are bound not by a spirit of fairness but what the law is as interpreted by the courts and although it's a very convincing approach the advisory committee that made the federal rules apparently did not feel that it was proper that they should do so and I think it has no application. It might be that I might think that they shouldn't even charge people for forgery, but that is my own opinion. I might think maybe it would be fair to let them go, but what I think and what the law is is entirely separate and apart, and, certainly, a feeling of fair play would not entitle the court, would not entitle

me—it would not even entitle me to give something to the defendant that I am bound by law not to give to him. If he wants to see the statement, of course, if he takes the stand in his own defense before he can be questioned from the statement, if in fact he is questioned from the statement, it has to be shown to him. He has a chance to read it and at that time only when he is on the stand would there be any fairness or unfairness in refusing to give him the statement. It just has nothing to do with the problem.

The Court: Now, do you have any law to support your position on that point?

Mr. Plummer: I think that Mr. Nesbett would be very prone, or would be very hard put to have any law to support his position, and the cases that I have read, and I have read numerous [15] cases on the subject, I have never seen a decision except possibly the California decision cited by Mr. Kay in his brief that talks about whether the decision turns on a question of fairness, and it is not a matter of fairness. It is a matter of law. There are a host of decisions, your Honor, that say it is not what we think the law should be, but it is what the law is and the law is that he is not entitled to it. There are a host of cases starting from the very first of the Federal Rules Decisions clear on down and you can go from the Shores case on down from it and there are just numerous, numerous cases holding that it is not the law and the Government cannot be required to do it.

The Court: Now, may I hear you on the motion

of Mr. Kay then, which is again renewed, for separate trial.

* * * * *

The Court: Very well. Do you wish to reply, Mr. Kay?

Mr. Kay: Very briefly, your Honor. On the first point, your Honor, relating to the motion for inspection. Mr. Plummer cites this host of cases and I have examined that host of cases and it amounts to about four decisions of District Courts, not Circuit Courts of Appeals, in almost every case. Each of those, your Honor, as Mr. Plummer has carefully pointed out, does not discuss the question of fairness, possibly because it was not argued because there is no answer to the question of fairness. It is obviously fair as Barren and Holtzoff point out that a man [16] should be allowed prior to trial, as is the right of every other witness, to inspect his own statement made the year previously, so there can't be any argument on that point. The whole argument that they go off on is the argument that Mr. Plummer has asserted here. It is not his property, that a statement taken from him is not his property. Well, I'd like to point out and point out very emphatically that that isn't what the rule says. It doesn't have to be his property for him to demand a right to inspect it. All it has to be is the property or a thing taken from him, obtained from him, or belonging to him or—the word “or” is there.

The Court: In the disjunctive?

Mr. Kay: Very true, your Honor. It is in the

disjunctive and the cases cited emphasize and ignore the emphasis of the words "not belonging to him, not something he owned or possessed at the time that it was taken orally and transcribed". They ignore the rule it was taken from him, obtained from him, and how they can get away from the language that a statement taken down by a reporter in shorthand is obtained from him, I don't know, and I believe if your Honor will examine the language of the Monroe case you will agree.

The Court: Counsel, may I just for your information read a portion of a case that has been handed to me by the Law Clerk. This is the case of *United States vs. Black*. You may have read it. It has just been handed to me. 6 FRD 270. Reading from Paragraph 2, 3 here is what the judge stated in writing that [17] decision, and I quote:

"As I construe Rule 16, it embraces only those documents and objects which were in existence and in the custody of a defendant or other person prior to the government's obtainment of them by process or seizure. It follows that any statements made to government agents after the commission of the alleged crime are excluded from inspection under the rule. This construction is substantiated by the notes of the Advisory Committee which are to the effect that the theory underlying Rule 16 is that the government must not be allowed to keep in its exclusive possession evidentiary matter which but for its impounding by the government would probably have been accessible to the defendant."

Mr. Kay: I know. I have read the language of

the Black case. That is the language of the District Court of Indiana, and, of course, the judge is entitled to his opinion, but I think, your Honor, that it would certainly be within the wise discretion of this court to disagree with that judge because if you will read Rule 16 you will discover there isn't a word in that case that it has to be a tangible object in existence, physical existence prior to the obtaining of it from the defendant. All it has to be is a book, paper, document, or tangible object in the disjunctive, or tangible object obtained from the defendant. [18]

Now, the court could just as well say, and I think your Honor would have to agree, that a statement I dictate to a stenographer sitting here and she transcribes it on a piece of paper is a paper obtained from me. It is a paper obtained from me and there is nothing in the rule that that paper has to be in existence prior to the time — of course, it wasn't in existence until it was obtained from the defendant, but it springs into existence immediately.

The Court: May I inquire, have you shepardized this Black case?

Mr. Kay: As far as I am aware — I have not, your Honor. As far as I am aware it was not taken up on appeal, at least on that point. It is not cited anywhere after that.

The Court: I wonder if there are any other cases that refer to the Black case, and I don't suppose you, Mr. Yates, know that, do you?

Mr. Yates: No, sir.

Mr. Kay: I can't recall whether the Monroe case that I cited cites the Black case or not, your Honor.

The Court: This is a 1946 case?

Mr. Kay: Yes, it is. There is one other point that I'd like to bring out on this subject, your Honor, and that is that Mr. Plummer referred to the fact that both Mr. Gore and I were present at the time that Mr. Ing made this statement. I don't know how that enters into it in any way—of course, there isn't [19] any provision that that would restrict the operation of this rule to things taken from a person only when certain persons were not there; but I will say this, that my memory and Mr. Gore's memory with regard to the details of that statement are probably less, much less acute than is the memory of the defendant Ing. I certainly can't recall the details of what was said excepting in a very general way, neither can Mr. Gore, and neither can Mr. Ing, and I think that, as Mr. Nesbett so ably pointed out, the whole spirit of fairness and as Barren and Holtzoff points out, and the Court of Appeals in the Monroe case calls to the wide exercise of the court's discretion giving us a chance the night before the trial to look at the document.

The Court: I wish counsel would have brought this up before since this is the first time this problem has ever been presented to this court.

Mr. Kay: I agree with you, your Honor.

The Court: I will have little time in which to consider your authorities or your argument. On the other point, that of separate trials, the court has gone into that quite thoroughly on a prior occasion

and at this time I deny that motion based upon what you have submitted to me; further, in respect thereto, as Mr. Plummer pointed out, it is a common occurrence that co-defendants oftentimes endeavor to place the blame on the other defendant and the mere fact they do attempt to do that is not grounds ipso facto to justify a separate trial. [20]

Mr. Kay: It is up to the discretion of the court.

The Court: Yes. Now, as to the other point, the court will have to reserve decision on it. Did you wish to be heard further, Mr. Nesbett?

Mr. Nesbett: I believe not only to point out that I certainly was not present at the time Mr. Smith's statement was taken, as long as we are going outside the record a little bit in this matter. It was taken in Seattle long before his arraignment and under circumstances of pressure, as I pointed out.

The Court: Yes. Mr. Plummer indicated that he thought the statement may have been made prior to the time you ever came into the case.

Unfortunately, I will have to reserve decision and search those authorities tonight because this is something, of course, of paramount importance and I think it will have far reaching effect upon criminal cases. Therefore, the court must consider it with such time as I have in respect thereto. [21]

February 19, 1958, 9:00 o'clock a.m.

Proceedings

The Court: The court at this time, in the case of United States of America, Plaintiff, vs. James Burton Ing, et al., Defendants, Criminal No. 3772, ren-

ders its oral opinion upon a motion made by counsel for the defendant Smith through Mr. Nesbett, and defendant Ing through Mr. Kay, wherein they request that statements made by their respective clients be made available to the counsel and the defendants prior to the trial of the case.

Argument of counsel directed itself principally to that of fair play, although other facets of the law was considered. The court feels that it is bound by the law which appears to be rather clear, and that is, that the defendant is not entitled to see the statement or statements that he may have made prior to the trial, and, further, that the defendant is not entitled to a confession that he may have made prior to the trial. A hurried, but unfortunately only cursory research of the law, which is all the time the court had to consider this matter, since this was submitted to the court yesterday afternoon at about 4:15 for consideration, reveals that the committee in the preparation of Rule 16 considered that aspect of Rule 16 to a certain extent but it has been ruled upon by a number of outstanding courts in the United States and it is a general law that while the court may grant the right to have the defendant see the statement and/or confession prior to the trial, courts have [23] repeatedly refused to grant this right and one of the strongest arguments that courts have used in denying this right is that, "How can a statement and/or confession which facts are known to the defendant, and, therefore, known to the defendant's counsel help to prepare for the defense of the defendant?"

For this reason and other reasons based upon the generally settled law, the motion for the opportunity to photograph and/or read the statements made by these defendants is hereby denied.

Now, I wouldn't want the Government to feel that in the event these statements may in the course of trial become necessary to be used that the defendants would not be entitled to a recess to consider these statements before being examined on the same. That is a matter that the court will determine at a later date, and would the Clerk of the Court please advise counsel forthwith of this ruling so that they will know. [24]

February 19, 1958, 10:00 o'clock a.m.
Proceedings

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The Court: Very well. Mr. Plummer, you may make your opening statement at this time.

Mr. Plummer: * * *. Now, there are only 20 counts in this indictment. You will hear from the witness stand, there will be proof offered to show that the size of the plot, the size of the operation was much in excess of that. Some of the individuals passed as many as 25 or 30 checks. Some of the individuals passed 10 or 15, so that the entire scope of the operation was much larger than the 20 counts that you will find in the indictment that you have to consider.

Mr. Kay: Your Honor, I must interrupt Mr. Plummer by offering objection at this time by mention of any supposed or alleged crime outside the

scope of the indictment. I think it is highly improper for Mr. Plummer to attempt to refer at this time to the passing of other checks either prior or subsequent to the passing of the checks on this occasion and I object to it.

The Court: Well, is it your position, counsel, that the evidence will reveal more checks than——

Mr. Plummer: Yes. It is my position, your Honor, the people from that witness stand under oath will say that they passed—they might be charged with four or five counts in the indictment or probably two or three counts in this indictment—they will under oath from that witness stand say that they [27] probably passed 20 checks or maybe 25 checks.

The Court: The objection is overruled. You may proceed.

Mr. Plummer: * * *. In addition to their instructions they were given definite percentages that they were supposed to work on. The percentages, as I understand it, varied between the different passers; usually it was on a 25 percent basis, sometimes it was on a 50 percent basis of the money that they defrauded people out of. They got these false and forged checks, they got a portion of that money prorated just like doing any other kind of work. As I said before, the scheme went surprisingly well. There was no detection here during the early stages because the banks were closed. The checks, of course, were not presented for payment and would not be at the bank until Tuesday morning, but in the meantime the same or similar operation with

the same type of checks was going on up in Fairbanks. The people up there——

Mr. Kay: Again I must object, your Honor, to the United States Attorney referring to — apparently he is going to offer proof of separate crimes other than those contained in the indictment of which none of these persons have been convicted and I know of no basis in law by which he can refer to these alleged separate crimes that he must be obviously attempting to influence the jury. I think it is highly improper. I object to it on behalf of the defendant Ing.

Mr. Plummer: May I be heard? [28]

The Court: Yes.

Mr. Kay: If there is going to be argument I think it should be out of the presence of the jury.

The Court: Very well. Please come to the bench.

(Whereupon, counsel for the plaintiff and counsel for the defendants approached the bench and the following proceedings were had out of the hearing of the jury:)

The Court: Mr. Plummer.

Mr. Plummer: I am going to base my remarks, your Honor, not on the law. I think after I explain what I am going to do there will be no question as to the law. There is going to be testimony from this witness stand that they had planned to go back at one time, that during the operation here they received word from Fairbanks that the people up at Fairbanks had been busted, that as soon as they received that they got in their car and headed back for Fairbanks.

Mr. Kay: What this amounts to, if I may point out to the court, is an attempt to bring before the jury allegations or proof of separate crimes committed in Fairbanks and apparently other crimes committed here other than those set forth in the indictment. Apparently a large number of these crimes are going to be set forth and it seems to me that obviously is outside the proper scope of any statement that can be made at this time. As I understand the law, the only proof that may be made of a [29] conviction of a crime is for the purpose of impeachment and not a mere offer or mere statement concerning the fact that the defendant has committed a large number of other similar crimes. I think it is precisely the same error Mr. Dugger committed in the Leonard case except we don't have a blackboard here with 84 separate crimes set out on it, but I am convinced it is absolutely improper, your Honor, and I object to it.

Mr. Plummer: My position, your Honor, is that certainly a witness can be asked if he knows why he left along with anybody else that might have been with him, left Anchorage at a certain time and if he knows he can answer that question.

The Court: Mr. Kay, do you take the position that the Government is not in a position to prove the *modus operandi*?

Mr. Kay: No proof of *modus operandi*, your Honor. He is not making that argument. He is alleging separate crimes were committed in Fairbanks, Alaska, by these defendants, at least by the

defendant Ing, as I understand it, for which Ing has never been accused let alone tried or convicted.

The Court: Well, Mr. Plummer, the court would take the position that you would be limited to the proof as set forth in the indictment and not permitted to go forth and prove other matters that are not set forth in the indictment. I understood in your opening statement that you were referring to more or less the *modus operandi* rather than to other crimes because it would be highly improper to prove other crimes excepting in conformance [30] with the rules of the court, that is, whether or not they have ever been convicted of any other crime.

Mr. Plummer: I had no intention of doing so. If I appeared to have done so I apologize to counsel but I had no intention of doing that.

Mr. Kay: I ask the jury be withdrawn and a mistrial declared.

Mr. Plummer: I don't believe I did do it. I think Mr. Kay is imagining.

Mr. Kay: I will refer to the record.

Mr. Plummer: All right, refer to the record.

(Thereupon, the Court Reporter read Lines 3 through 16, page 28.)

Mr. Plummer: May I remark, I did not accuse these defendants even remotely of doing that up in Fairbanks.

Mr. Kay: Well, the inference is clear. The same operation was going on in Fairbanks he said.

Mr. Plummer: I said the same type of checks.

The Court: Decision is reserved. I would ask

counsel to be very careful not to refer to other crimes excepting in the manner permitted under the rules.

Mr. Plummer: Yes, sir.

The Court: And, as I stated before, I understood your first objection was that you would not think the Government was entitled to put on proof of *modus operandi*. I thought that [31] was improperly objected to. That is upon the basis I ruled at that time, but I sustain your objection reference to any additional crimes.

Mr. Hepp: While we are assembled here I'd like to take up another matter in connection with objections.

The Court: All right.

Mr. Hepp: It is very awkward for counsel to race each other to the floor to voice an objection. Very often I presume that the objection will be identical and it sounds rather ridiculous or silly for the second and then the third counsel to mimic the first. I would like to ask the court's attitude concerning applying the objection of any counsel as it may be appropriate to all three of the defendants, thereby eliminating the need for each singularly jumping to our feet and mimicking the one just before.

The Court: What is the attitude of other counsel in respect to this problem?

Mr. Nesbett: Naturally I would want to join in for my defendant, Mr. Smith.

Mr. Kay: As I understand it, if one of the counsel for the defense makes an objection it is

understood that that same objection goes for the other counsel?

The Court: That is the request.

Mr. Kay: That is satisfactory. It is all right with me.

The Court: What is your position, Mr. Plummer? [32]

Mr. Plummer: It makes no difference to me.

Mr. Kay: It saves three of us jumping up.

The Court: That is true, but since you brought up the subject I'd like to get counsels thinking on the question of cross examination. Now, each counsel has a right to cross examine fully. On the other hand, it has been my experience and I am sure counsels experience that it would be improper to let each counsel go over the same field and the same groundwork as that has been covered by the other counsel. So I would request counsel not to try to duplicate the same field that has been covered by other counsel.

Mr. Kay: One counsel might, however, have an additional point or thought along the same line that he might want to bring out.

The Court: That would be perfectly acceptable as far as the court is concerned.

Mr. Kay: No sense in overlapping one another.

Mr. Nesbett: Your Honor, I want to mention one thing here in connection with Mr. Kay's objection to some of the remarks Mr. Plummer made. I have never known Mr. Plummer to be anything but in good faith. But there is this much about it, we all know that at the conclusion of his case

if he hasn't proved everything that he offered to in his opening statement we can necessarily move for judgment of acquittal, but if he has proved, say, the elements of the indictment, that is it. Now, I hope that he is [33] in good faith in stating that he hopes and intends to prove this broad scope of giving the jury the impression this is a huge ring these fellows are a part of, if not the moving force inside it. That can be highly prejudicial if he makes such statements knowing that he has not got the witnesses to actually back it up to the extent that he intends and promises. That is the thought that occurred to me at the time he was making the statement. I only mention that in passing in support of Mr. Kay's argument.

The Court: Yes. I think I have made myself clear. The only thing remaining to be determined by the court is Mr. Kay's motion which the court has reserved decision on.

Mr. Kay: Very well, your Honor.

Mr. Plummer: I will advise counsel that I did make the statement in good faith and I think I do have the witnesses to corroborate it.

The Court: Very well.

(Thereupon, the discussion completed, counsel for the plaintiff and counsel for the defendants resumed their seats and the following proceedings were had in the presence of the jury:)

The Court: Now, Mr. Plummer, you may proceed. [34]

* * * * *

February 20, 1958, 10:00 O'Clock A.M.
Proceedings

* * * * *

The Court: You may call your next witness.

Mr. Plummer: I request that the bailiff call Mrs. Virginia Shields. She is back in the jury room.

VIRGINIA SHIELDS

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel.

Q. (By Mr. Plummer): Would you please state your name? A. Virginia Shields.

Q. And what was your occupation during the Labor Day week-end of 1956?

A. Clerk in the Fifth Avenue Grocery and Liquor Store.

Q. That is here in the City of Anchorage?

A. Yes, it is.

Q. Who was the proprietor of the Fifth Avenue Cash Grocery at that time? A. Mrs. Peters.

Q. And you worked for her, is that correct?

A. I did, yes.

Q. Now, do you know any of the defendants in this case? [37] A. No, I don't.

Q. Did you have occasion during your employment to accept—I will withdraw that question and ask that this be marked for identification as Plaintiff's Exhibit No. 8, I believe it is. (The document was so marked.)

(Testimony of Virginia Shields.)

Mr. Plummer: May I approach the witness, your Honor.

The Court: You may.

Mr. Hepp: I object to any questions being put unless I have had an opportunity to examine the identification.

The Court: Very well, you may show it to counsel.

(The document was handed to defense counsel and thereafter returned to Mr. Plummer.)

Mr. Plummer: May I now approach the witness, your Honor.

The Court: You may.

Q. (By Mr. Plummer): Mrs. Shields, I hand you what has been marked for identification only as Plaintiff's Exhibit No. 8. Would you look at it carefully and tell me what it is?

A. It's a check I took in on the Labor Day weekend, Saturday afternoon I believe.

Q. And would you tell me what kind of a check it is and, if you will, the serial number from the check on the front?

A. Morrison-Knudsen 9078.

Q. Who is it made payable to? [38]

A. Wendell R. Ware.

Q. Now, will you look at the back of the check and is there an endorsement on there?

A. Wendell R. Ware.

Q. And was that written in your presence?

A. Yes, it was.

Q. And can you tell us, Mrs. Shields, or can

(Testimony of Virginia Shields.)

you point out to the court and jury the man that wrote that if he is in the court?

A. Third man over, first row, right side.

Q. Is that this gentleman in the blue suit?

A. Yes, it is.

Q. And if his name is Charles E. Smith then your answer is Charles E. Smith? A. Yes.

Q. Thank you. Now, do you remember anything about the purchase this gentleman made from you at the time he cashed the check, if in fact he made a purchase?

A. Yes, he made a purchase of whiskey, I believe it was.

Q. And did you give him the whiskey?

A. Yes, and also the change.

Q. And what is the check made out for?

A. \$177.74.

Q. And you took out for the whiskey and gave him the balance? A. Yes. [39]

Q. Do you recall whether or not, Mrs. Shields, you required any identification from this witness at the time he offered you the check?

A. Yes, he showed me identification.

Q. Do you recall what kind of identification it was?

A. Well, I am not sure whether it was a driver's license or what, but a little card with his picture.

Q. It did—— A. To the left.

Q. It did have a picture on it? A. Yes.

Q. Is the picture of the same gentleman or the same likeness as this gentleman sitting here?

(Testimony of Virginia Shields.)

A. Yes.

Q. Now, I wonder if you would look at the reverse side of the check again and see whether or not it carries a bank perforation on it? A. Yes.

Q. Can you tell me whether or not your company, the Fifth Avenue Grocery, realized any cash from this check?

A. Would you state that again, please?

Q. Did the company for which you worked at that time, the Fifth Avenue Grocery, realize any money from this check? A. No.

Q. And would you tell me why, if you know?

A. Well, she didn't put it through the bank. One of the policemen picked it up, picked the check up.

Q. And why did they pick it up, if you know?

A. She called up the Police Department and asked them if the M-K checks were good. He said no, he would be down to pick it up.

Mr. Plummer: I have no further questions.

The Court: You may cross examine then, Mr. Nesbett.

Cross Examination

Mr. Plummer: I am sorry, your Honor. I apologize to Mr. Nesbett. I, at this time, ask leave of the court to approach the witness and I'd like to offer that in evidence.

The Court: Is there any objection? Counsel have had a chance to see it.

Mr. Nesbett: I'd like to see it again, your Honor.

(Testimony of Virginia Shields.)

The Court: Very well. You may hand it to counsel again.

(Thereupon, the document was handed to defense counsel.)

The Court: Mr. Plummer, could you refer to the count?

Mr. Plummer: I am sorry, your Honor. That is check No.——

The Court: 9078. [41]

Mr. Plummer: 9078 and it is mentioned in Count I of the indictment.

The Court: Thank you.

Mr. Nesbett: Your Honor, may I confer with Mr. Plummer a moment about this?

The Court: Yes.

Mr. Nesbett: I have no objection, your Honor, to this check going into evidence.

The Court: Without objection then it may be admitted and marked Government's Exhibit No. 8.

Mr. Plummer: There is one alteration that Mr. Nesbett wanted to make on the check. I told him I had no objection. We probably better have the in-court deputy make the alteration since it has been marked for identification.

The Court: Very well. Do you wish to state in the record what that is?

Mr. Nesbett: Extraneous marking stamps on the check, your Honor.

The Court: Is it on the instrument itself or is it on the container?

(Testimony of Virginia Shields.)

Mr. Plummer: I think it is loose within the container, your Honor. May we approach the bench.

(Thereupon, Mr. Plummer and Mr. Nesbett approached the bench, without the reporter. After discussion the following proceedings were had:) [42]

The Court: Mrs. Dome, will you please remove that white slip?

Deputy Clerk: Yes, your Honor, I did.

The Court: Mr. Plummer, is there any need to retain this slip?

Mr. Plummer: I would think not, your Honor, but——

The Court: It has identification——

Mr. Plummer: To make sure I will, if I may, take it back to my files.

The Court: Without objection. Now, you may proceed, Mr. Nesbett.

Q. (By Mr. Nesbett): Now, Mrs. Shields, about what time of the day did you receive this check?

A. It was in the afternoon.

Q. And that was Saturday afternoon, was it?

A. I believe so.

Q. You believe so? A. Uh-huh.

Q. Well, don't you know?

A. Well, it could have been Friday or Saturday afternoon, one or the other days.

Q. You have refreshed your recollection in connection with the facts before coming here into court, haven't you?

A. No, I haven't thought much about it. [43]

(Testimony of Virginia Shields.)

Q. You haven't thought much about it?

A. No, I haven't.

Q. Well, you have discussed the case surely with Mr. Plummer before coming in to be a witness?

A. Well, I don't know if I discussed it with him, no.

Q. You didn't. You don't know whether you did or not?

A. No, I wouldn't say I discussed it with him.

Q. Well, did you or didn't you?

A. Well, no.

Q. You did not. Now, it was either a Friday or a Saturday as near as you can recall?

A. Either Friday or Saturday. I don't recall which day.

Q. That was the Labor Day week-end?

A. Yes.

Q. Was it rather a busy time?

A. No, we weren't busy.

Q. Is your store located in that Piggly Wiggly arrangement on Fifth Avenue?

A. No, it isn't.

Q. Where is it located?

A. 603 East Fifth Avenue.

Q. And you weren't busy at all, is that right?

A. No.

Q. Do you remember this person coming to your store and buying the liquor? [44]

A. Yes, I do.

Q. Very distinctly? A. Yes.

Q. Did you size him up and get a good mental

(Testimony of Virginia Shields.)

picture of the person at the time you accepted the check?

A. I recall what he looked like, yes.

Q. And did you make a special point to remember his appearance any more than you would on any other payroll check?

A. Oh, not any more than any other.

Q. You cash a lot of payroll checks or did at that time in that store, didn't you?

A. No, we didn't.

Q. You did not? A. No.

Q. Then how does it happen you accepted this one?

A. Well, I have cashed M-K checks before and they were good.

Q. So you accepted this one?

A. Yes, I did.

Q. Well, as a matter of fact, you have accepted a lot of payroll checks in that store in the course of your business, haven't you? A. A few.

Q. Now, you say you don't recall whether he bought whiskey or what, is that right? [45]

A. Whiskey, I would say.

Q. You would say. Well, do you recall?

A. Yes, it was whiskey.

Q. It was whiskey? A. Yes.

Q. Do you recall what he bought?

A. It was either Seagrams 7 or V.O.

Q. One bottle or two?

A. One. Just one bottle, a fifth.

Q. And took the entire change in cash, is that

(Testimony of Virginia Shields.)

right? A. Yes, he did.

Q. Now, you saw an identification card with his picture on it, is that right? A. Yes, I did.

Q. And compared the picture on the card, did you, with the person before you? A. Yes.

Q. When did you next learn or hear anything about that check?

A. When it came out in the papers.

Q. And when was that?

A. The following week. Tuesday I believe it was.

Q. You accepted the check on a Friday or a Saturday and heard nothing more about the incident until possibly the following Tuesday?

A. That is right. [46]

Q. And your information about having — or, your attention was redrawn to that check by reason of something you saw in the paper, is that right?

A. Yes.

Q. What did you see in the papers?

A. Just that the checks were going around the City of Anchorage.

Q. Actually the Fifth Avenue Liquor Store never presented the check for payment, did they?

A. Not to the bank, no.

Q. It was picked up by who?

A. A policeman.

Q. And in the course of your business after you accepted the check what did you do with it? Put it in the till of the cash register? A. Yes.

Q. And then turned it over to your relief or were you the manager of the store in any fashion?

(Testimony of Virginia Shields.)

A. No. Mrs. Peters owned and managed the store.

Q. Then in the course of the routine of your duties you would turn over your cash and checks to Mrs. Peters, is that right?

A. Yes. We left everything in the till. She took care of everything.

Q. Did you do that on that week-end or do you recall?

A. Turned over the cash you mean? [47]

Q. Cash and checks?

A. I just left it in the till. I had nothing to do with that.

Q. And heard nothing more about the matter until approximately the Tuesday following?

A. That is right.

Q. Now, did you then on the Tuesday following give any description or make any identification of the person who had brought the check to your store?

A. I didn't talk to anyone.

Q. And when did you next have occasion to consider the identity or description of the person who signed that check?

A. Oh, it was a year or so later that I was asked to identify the party.

Q. Over a year later. And from that point until today in court you were not asked to identify him, were you?

A. Once I identified him.

Q. Well now, prior to your identification here in court today weren't you advised where the man was sitting?

(Testimony of Virginia Shields.)

A. Today I wasn't advised where he was sitting.

Q. Wasn't there a gentleman who went back to you in the back of this room and pointed out where the defendant Smith was sitting?

A. Not today.

Q. Not today? A. No. [48]

Q. When did that last happen?

A. Yesterday.

Q. It happened yesterday, didn't it?

A. Yes.

Q. It was a gentleman in a brown suit, wasn't it?

A. I am not sure what color suit he had on.

Q. Who is the gentleman who came to you and told you where Smith was sitting?

A. Yesterday it was a policeman I believe.

Q. And—— A. I don't know his name.

Q. Which policeman?

A. Just a policeman.

Q. Well, which one? Is he in the room?

A. I don't see him.

Q. Do you know whether he is an Anchorage policeman or Territorial policeman or Federal policeman?

A. No, I don't. I wasn't informed. I don't know. Just a policeman.

Q. Where were you standing when he came to you and pointed out Mr. Smith?

A. Well, let's see. I believe I was in the District Attorney's office at the time, as far as I can remember.

Q. In the District Attorney's office yesterday?

(Testimony of Virginia Shields.)

A. Yes. [49]

Q. When he pointed out Smith to you?

A. Well, he had a drawing.

Q. Of where he was sitting in court?

A. Yes.

Q. I see. A. Yes, yesterday.

Q. What time yesterday? That was before we selected the jury, wasn't it, you came into court and stayed until the witnesses were excluded?

A. It was, yes. That was before the jury was picked.

Q. Did Mr. Plummer ask you to come to his office for that purpose or for any purpose?

A. No.

Q. How did you happen to be in Mr. Plummer's office?

A. I had a telephone call from the girl asking me to appear.

Q. To come down to the U. S. Attorney's office?

A. Yes.

Q. And that was before lunch or after?

A. That was in the morning.

Q. That was in the morning, and this gentleman, this police officer then was in Mr. Plummer's office with a diagram or did he draw the diagram after you came?

A. I didn't see him draw it so I wouldn't know.

Q. Did he make a sketch of the relative position that Mr. Smith occupied in the courtroom over in the Elks Club [50] there? A. Yes.

(Testimony of Virginia Shields.)

Q. And was the sketch all prepared when you showed up in the District Attorney's office?

A. Yes, when I saw it.

Q. It was all drawn up?

A. It was drawn up.

Q. It was handed to you and a certain position marked Smith? A. Yes.

Q. Did you subsequently use that sketch and go and take a look at Smith? A. No, I didn't.

Q. Didn't you go over to the courtroom?

A. Yes.

Q. You did, didn't you? A. Yes.

Q. Did you take a look at Smith?

A. I don't recall whether I did or not.

Q. Well now, Mrs. Shields, you are here for one purpose only, aren't you, to identify a check of Mr. Smith? A. Yes.

Q. Well, didn't you after receiving that sketch at Mr. Plummer's office go over and take a look at Mr. Smith?

A. We went in and sat down. I looked at him when I sat down.

Q. You did look at him? [51]

A. When I sat down.

Q. Well, whether you were sitting down or standing up, you did look at him, didn't you?

A. Yes, I glanced over.

Q. You glanced over and saw him. You made a mental picture that that is Smith, didn't you? He was dressed just like he is now, wasn't he?

A. Yes.

(Testimony of Virginia Shields.)

Q. And so today you recognize Smith as being the same man that was pointed out to you by means of a diagram in the Elks Club courtroom yesterday, isn't that right? A. Yes.

Q. Did you observe this man who cashed that check place his signature on it, Mrs. Shields?

A. Yes.

Q. And did you compare the signature on it with the signature or the name on the identification card? A. Yes, I did.

Q. And you don't recall though what type of identification card he had, is that right?

A. No, just a card with his picture on it and name.

Q. Was there a signature on the identification card or merely a typed name?

A. I don't recall now.

Q. Don't you ordinarily require as identification something [52] with a man's signature on it?

A. Or a picture. Yes, like an I.D. card or something like that.

Q. You don't recall whether there was a signature or not on the card that was used to identify—— A. No, I don't.

Q. Nor the type card it was?

A. No, I don't know what type of card it was.

Q. And do you recall specifically the person signing the check? A. Yes.

Q. What did he use as a support in order to sign the check? Counter?

A. Yes, we have a counter.

(Testimony of Virginia Shields.)

Q. Is there a counter there?

A. Yes, there was.

Q. And did you watch him as he signed it?

A. Yes.

Q. Did he borrow a pen from you to sign it?

A. I don't recall.

Q. Well, do you recall anything else in connection with the signature? A. No.

Q. Do you recall whether he signed with his left hand or his right hand or how? [53]

A. No, I don't recall which hand.

Q. You don't recall that. You do recall, however, that you recognize the man immediately a year later after he was shown to you?

A. Yes, I recognize him.

Q. And after the diagram was presented to you, you then took another look at him yesterday in the Elks Club? A. Yes.

Q. Mrs. Shields, did you cash any other checks over that Labor Day week-end, payroll checks?

A. No.

Q. Had you, or did you have occasion to cash any other M-K checks in that area of time, that is, shortly before or shortly after Labor Day?

A. No. Just that one.

The Court: A little louder so the jurors can hear you.

A. No. I just cashed that one.

Mr. Nesbett: That is all.

The Court: Mr. Hepp, do you have any questions?

(Testimony of Virginia Shields.)

Mr. Hepp: I have no questions.

The Court: Mr. Kay.

Mr. Kay: Just a moment, your Honor.

The Court: Very well.

Mr. Kay: I have no questions. [54]

The Court: Very well. Any redirect, counsel?

Mr. Plummer: Just several questions, your Honor.

Redirect Examination

Q. (By Mr. Plummer): Mrs. Shields, is there any doubt in your mind that the gentleman sitting here is the gentleman who cashed the check on this Labor Day week-end?

A. There is no doubt.

Q. Now, to clear up any misunderstanding that might arise, although you did not talk with me did you talk with somebody else in my office?

A. Yes.

Q. And it was one of my assistants?

A. I guess so. I don't know his name.

Q. You don't know the gentleman's name?

A. No, I don't.

Mr. Plummer: That is all the questions I have.

The Court: Is there any recross?

Mr. Nesbett: Could I ask another question, your Honor.

The Court: Pertaining to prior direct or redirect?

Mr. Nesbett: Would be hard to say. I am sure there [55] won't be any objection.

The Court: You may proceed.

(Testimony of Virginia Shields.)

Recross Examination

Q. (By Mr. Nesbett): Mrs. Shields, there are other employees in that liquor store, are there not?

A. No. Mrs. Peters and myself were the only two.

Q. Do you know whether Mrs. Peters took any checks over that week-end, the M-K checks?

A. No, she didn't.

Q. She did not? A. No.

Q. It is a grocery store combined with a liquor store, is it? A. Yes.

Q. Six hundred block on East Fifth?

A. 603 East Fifth Avenue.

Mr. Nesbett: That is all.

The Court: Very well. You may step down then, Mrs. Shields.

(Thereupon, the witness was excused and left the stand.)

The Court: You may call your next witness.

Mr. Plummer: Ask the bailiff to summon Mr. Henry Futor. [56]

HENRY FUTOR •

called as a witness for and on behalf of the Plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, Mr. Plummer.

Q. (By Mr. Plummer): Would you please state your name, sir?

A. Henry Futor, F-u-t-o-r.

(Testimony of Henry Futor.)

Q. And will you tell us what your occupation was over the Labor Day week-end of 1956?

A. Clothing salesman at the Hub Clothing Company.

Q. And that is still your employment, is it?

A. Yes.

Q. Who is your employer?

A. Harold Koslosky.

Q. Now, what, if anything, unusual occurred on that week-end as regards the case?

A. Well, that Saturday prior to the Labor Day holiday we processed and cashed three supposedly good Morrison-Knudsen checks.

Mr. Plummer: May I have this marked for identification. It will probably be No. 9.

The Court: Yes.

Mr. Plummer: I will show it to counsel. [57]

The Court: Yes, if you will please.

(Thereupon, the document was handed to defense counsel and thereafter returned to Mr. Plummer.)

Mr. Plummer: May I approach the witness, your Honor.

The Court: You may.

Q. (By Mr. Plummer): Mr. Futor, I hand you what has been marked for identification only as Plaintiff's Exhibit No. 9 and ask you to look it over and tell me what it is, if you know?

A. Well, this is one of the checks that we cashed down there on that Saturday.

Q. Would you tell me what it purports to be?

(Testimony of Henry Futor.)

A. Pardon me?

Q. Will you tell me what it purports to be, if it has a company name and a number and the amount and the payee?

A. Well, it is a Morrison-Knudsen check, with a signature and the amount of—net amount of \$177.47.

Q. And would you tell me the name of the payee, sir?

A. Wendell R. Ware.

Q. Would you tell me the serial number of the check?

A. Serial number of the check is 8833.

Q. Do you know from your own recollection, did you take any of these checks that day?

A. Well, I did. I handled all three of them and waited on the customers and in each case they made a purchase and I did [58] inspect the identification, such as it was, and verified the signature on the identification card with a signature on the check, endorsement on the check and assumed that they took—they were in order and Mr. Koslosky then deducted the amount of the purchase and handed over the change.

Q. And do you recall, sir, what the items were they purchased, these people, if you know?

A. Well, I do. The first purchase was a pair of Red Wing, by brand name, boots.

Mr. Nesbett: Could I interrupt merely to ask if he testifies to all three checks or as to this check?

Mr. Plummer: He is testifying now as to the three purchases made by M-K checks that week-end.

(Testimony of Henry Futor.)

Mr. Kay: I object, your Honor, to any testimony concerning the other two checks unless they are counts in this indictment.

The Court: Are they in the indictment, counsel?

Mr. Plummer: I think not, your Honor, but I will——

The Court: Objection sustained then.

Mr. Plummer: May I be heard before you rule?

The Court: Well, I have ruled but you may be heard.

Mr. Plummer: I was going to mention to the court and to Mr. Kay, of course, the very, very common rule of the same and similar transactions prove motive, mistake and so on. I think it is a very valid proffer, but rather than struggle with the [59] thing at this time I will withdraw my question. I will advise Mr. Kay, however, that one of these days when he makes it I am going to cite him some law.

Mr. Kay: Fine, we will have a good time.

Mr. Plummer: If I may have just a minute to collect my thoughts, your Honor.

The Court: Yes, you may.

Q. (By Mr. Plummer): Now, Mr. Futor, I wonder if you would be good enough to look around the courtroom and see if you recognize anybody in this courtroom that passed one of those checks to you on that date?

Mr. Nesbett: I object to that question, your Honor. It is not confined to the exhibit that is before the court for identification. The only question

(Testimony of Henry Futor.)

is, can he identify the person who passed that check.

The Court: Objection sustained. He may rephrase the question.

Q. (By Mr. Plummer): Did you take all three M-K checks, make the sales on all three M-K checks? A. I did.

Q. And is the party, or, can you recall, sir, the name that the party used?

The Court: Pardon me just a moment. Mr. Johnson, that [60] is not the gentleman. There was another gentleman came in and maybe he is in the hall. That is all right. He is not smoking in the courtroom now. That is my concern. It is so close in here at best, besides the fact you are never permitted to smoke in the courtroom anyway. I am sorry, Mr. Plummer.

Mr. Plummer: Thank you, your Honor.

Q. (By Mr. Plummer): Do you recall the name that was used in the endorsement of the check that you took, sir? Was it Wendell R. Ware?

A. Well, I don't recall that from memory, Mr. Plummer, but as it comes back to me—naturally, I see it here.

Q. Yes, and will you look at the back of the check that you have. Would you see how it is endorsed? A. Endorsed Wendell R. Ware.

Q. Do you recognize in the courtroom the party that so endorsed and negotiated that check?

A. I am afraid I can't.

(Testimony of Henry Futor.)

Mr. Plummer: May I have just a minute, your Honor.

The Court: You may.

Q. (By Mr. Plummer): Can you testify, sir, that that is one of the three checks that were taken in on that day?

Mr. Hepp: I object; leading and suggestive. I don't think that is a proper question.

The Court: The objection is overruled. He may answer [61] that question.

A. Well, I can testify that it is one of the three checks that was taken that day, definitely.

Q. But——

A. Without question in my mind this is definitely one of the three checks that was taken in that day at the store.

Q. Now, subsequent to its being taken in on that date do you know what, if anything, happened to the check?

Mr. Hepp: I object. I believe this witness can state what he may have done with the check. I think the question is too broad and would bring in possibly a dangerous answer. We can't evaluate the answer or his offers. He can state those things that he did. I think what was done is very broad and we ask it not be allowed.

Mr. Plummer: He can state if he knows, your Honor.

The Court: But only if you know, Mr. Futor. You may state as to what did take place with the check, if anything.

(Testimony of Henry Futor.)

A. Well, of course, the check——

The Court: That is, of your own personal knowledge. What somebody else may have told you may not be proper. Do you understand that?

A. Yes, sir. Well, in that case then, after they left my hands Mr. Koslosky completed the transaction.

Mr. Hepp: Now, I object to the witness continuing then, this being purely hearsay. [62]

Mr. Plummer: Let him tell what he saw until he starts telling what——

Mr. Hepp: He said Mr. Koslosky completed the transaction.

Mr. Plummer: He hadn't completed his answer. Maybe he has——

Mr. Hepp: I believe it is going to be dangerous. Once it is out it is too late.

The Court: Mr. Futor, I have instructed you not to testify as to what somebody may have told you, but what you actually know of your own knowledge, and you have testified that Mr. Koslosky completed the transaction. Now, you may proceed, counsel.

Q. (By Mr. Plummer): Now, did you or did anybody else within your sight have any further dealings with this check, sir, or do you know of your own knowledge anything further about this check, not what somebody told you but of your own knowledge?

A. Well, of my own knowledge I know they were deposited in the bank in the National Bank of Alaska.

(Testimony of Henry Futor.)

Mr. Hepp: I object to that and ask it be stricken. I don't see how he could possibly know that of his own knowledge. It would have come to him as purely hearsay and that is what we have been trying to avoid.

The Court: How do you know?

Mr. Plummer: The witness testified, he said of his [63] own knowledge he knew it was.

The Court: The objection is overruled until it is established that he is testifying from hearsay, of course, in which event then it would be highly improper.

Mr. Hepp: Excuse me. May I ask the court to instruct the witness as to what the word knowledge means in that sense. To a layman it means anything he comes by knowing in any manner and it may be told to him by somebody else and he then deems it his knowledge, and it is still objectionable.

The Court: In this sense, Mr. Futor, the word knowledge is used in a restrictive sense, only what you personally know, not what may have come to your attention. Now, you have testified that this check was deposited in the bank. Do you know that of your own knowledge or what somebody else told you?

A. Well, it was the procedure in this business.

The Court: Well, the objection is sustained then.

Q. (By Mr. Plummer): Now, did you have occasion, sir, to see the check again after that weekend when it was presented to you as part of the payment for the sale you made? A. I did.

(Testimony of Henry Futor.)

Q. And would you tell us when that was, sir?

A. Well, when this check was returned to the Hub Store by their bank, the one in which it was deposited, with the bank's notation—just what the notation was on there I have [64] forgotten, but it was either an unauthorized signature or counterfeit or forgery. I rather think it was unauthorized signature, whatever they stamped on there.

Mr. Hepp: I am going to object to that testimony. This witness is guessing at what may have been on it when it came from the bank.

The Court: The objection is sustained. You may testify as to what was on it.

Mr. Hepp: I would like to have that portion of his testimony stricken from the record.

The Court: The motion is granted and the jury is instructed not to consider the answer given by this witness. You may proceed.

Mr. Plummer: May I have just a minute.

The Court: Yes, you may.

Mr. Plummer: I have no further questions.

Cross Examination

Q. (By Mr. Nesbett): Mr. Futor, did you take all three of the M-K checks that were received by your store on that day?

A. I did and I processed them.

Q. Are you the manager there in Mr. Koslosky's absence? [65]

A. Oh, after a fashion, yes.

(Testimony of Henry Futor.)

Q. But you do pass on all the checks that are presented for cashing, is that right?

A. In many instances, yes, if he doesn't—happens to be away or out.

Q. After you had cashed the checks Mr. Koslosky had the most to do with them thereafter, is that right?

A. I didn't get that?

Q. I say, after you had accepted the checks Mr. Koslosky had the most to do with them thereafter, did he not?

A. Oh, yes. Yes.

Q. And it was more his concern as owner of the store than yourself as manager, isn't that a fact?

A. Right.

Q. Now, actually, Mr. Futor, until you were reminded of the name Wendell Ware you wouldn't have known that that check, as you say now, was one of those accepted, isn't that the fact?

A. Well, I just didn't quite understand that question.

Q. When were you subpoenaed to appear here?

A. Yes, sir.

Q. And on what date were you subpoenaed to appear?

A. I didn't bring the subpoena.

Q. Was it to appear yesterday?

A. I was subpoenaed to appear. [66]

Q. Yesterday?

A. Yes, sir.

Q. And did you appear first in response to that subpoena at the courtroom at the Elks Hall?

A. Yes, sir.

Q. Or did you appear in Mr. Plummer's office?

(Testimony of Henry Futor.)

A. Well, I appeared at the office and then was instructed to go to the courtroom in the Elks Club.

Q. And at the time you reported to the office did you discuss the matter of checks that had been received by Koslosky's Store with Mr. Plummer or any of his staff? A. No.

Q. Did you discuss the checks that Koslosky's Store had received with Mr. Plummer at the courtroom yesterday? A. No, sir.

Q. Or did you discuss it last night or today with him prior to taking the witness stand?

A. No, sir.

Q. It is only because the check was handed to you on the witness stand that you happened to remember that it is one of the three checks you took that day, is that right? A. Yes, that is right.

Q. You have no recollection then other than that it was one of the three?

A. Well, I have the recollection that this is one of the three. [67]

Q. What causes you to remember that it was one of the three?

A. The amount. I remember the amount very well. \$177.47. The date. Pay period ending August 19. We were cashing this along about September 2nd. That all is remindful to me of this check.

Mr. Nesbett: That is all, your Honor.

The Court: Mr. Hepp.

Mr. Hepp: I have no questions.

The Court: Mr. Kay.

(Testimony of Henry Futor.)

Cross Examination

Q. (By Mr. Kay): Mr. Futor, just one question. Do you recall what time in the afternoon it was when you cashed this check?

A. Mid afternoon.

Q. 3:00 o'clock, 4:00 o'clock?

A. Between 2:00 or 3:00, I'd say.

Mr. Kay: That is all the questions I have.

The Court: Any redirect, counsel?

Mr. Plummer: No, your Honor.

The Court: It is now after 3:00. Should we take a short recess at this time?

Mr. Plummer: Satisfactory with the prosecution. [68]

The Court: Very well. Court will go into recess for a period of 10 minutes.

(Whereupon, at 3:10 o'clock p.m., following a 10-minute recess, court reconvenes and the following proceedings were had:)

The Court: Let the record show all the jurors are back and present in the box. You may call your next witness.

Mr. Plummer: May I inquire if there are any witnesses in the courtroom that are under Government subpoena? Your Honor, I would like to call—for the sake of the record the last check we talked about was No. 8833. It was mentioned in Count 3 of the indictment. I would like next to call Mr. Ivan Barton. * * * * *

The Court: Now, your next witness, please.

Mr. Plummer: Mr. Barton.

IVAN BARTON

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

Q. (By Mr. Plummer): Would you please state your name, sir? A. Ivan Barton.

Q. And would you tell me what your occupation was over the Labor Day week-end of 1956 here?

A. I am a partner in the Union Club.

Q. And were you a working partner that day at the Union Club? A. Yes.

Q. On duty there? A. Yes.

Mr. Plummer: May I approach the witness, your Honor.

The Court: You may.

Q. (By Mr. Plummer): Mr. Barton, I hand you what has been marked for identification only as Plaintiff's Exhibit No. 10 and ask you what it is, if you know? A. It is a check.

Q. And will you be good enough to tell us the name of the company, the name of the payee, and the serial number of the check?

A. It is a Morrison-Knudsen Company check. Payee is Wendell R. Ware. \$177.47.

Q. What is the serial number on the check?

A. 8895.

Q. Now, have you had occasion to see that check before? A. Yes, I have seen it before.

Q. Did you have occasion to see it on Labor Day week-end 1956?

(Testimony of Ivan Barton.)

A. Well, I saw it when it come back from the bank after the week-end.

Q. Will you tell us, sir, if you know who cashed that check in your establishment? [70]

A. No, I don't know who cashed this particular check. There was four checks presented.

Mr. Hepp: Just a moment. I object to any further. I think the witness responded to the question and I ask another offer be made.

The Court: I feel, Mr. Hepp, that the answer to the question was responsive. He was explaining why he didn't know this——

Mr. Hepp: I quite agree with the court. I was asking that he not continue on until after he had been asked for another offer so we can evaluate it.

The Court: Thank you. You may proceed, Mr. Plummer.

Mr. Plummer: Thank you, your Honor.

Q. (By Mr. Plummer): Now, did you receive a check, Morrison-Knudsen check that week-end which was made payable to the order of Wendell R. Ware? A. Yes.

Q. And was there a gentleman that you noticed that week-end in your establishment who purported to be Wendell R. Ware?

Mr. Nesbett: I object to that question, your Honor, as having no connection whatsoever with the case. He admits that he wasn't there over the week-end. He is not competent to answer. He came back after the week-end and saw the checks.

Mr. Plummer: That wasn't his testimony, your

(Testimony of Ivan Barton.)

Honor. If the record is read back that is not his testimony. [71]

The Court: The objection is overruled. He may answer the question; of your own knowledge, of course, Mr. Barton, not what somebody may have told you.

A. Will you repeat the question?

The Court: It may be read back.

(Thereupon, the Reporter read Question
Line 18 Page 71.)

A. Yes.

Q. (By Mr. Plummer): And do you see him present in the courtroom today? A. I do.

Q. And will you point him out to the court and jury?

A. He is right back of the gentleman right back there (pointing) third seat in.

Q. Third seat in the front row?

A. Uh-huh.

Q. Would this be the gentleman, sir?

A. That is the gentleman.

Q. And if his name is Charles E. Smith it would then be Charles E. Smith, is that correct?

A. Uh-huh.

The Court: You will have to speak louder, Mr. Barton, please.

A. Yes.

Mr. Plummer: May I have just a minute, your Honor.

The Court: You may. [72]

Q. (By Mr. Plummer): Now, do you know, sir,

(Testimony of Ivan Barton.)

what happened to this check after it was taken in during the normal course of business over that Labor Day week-end, of your own knowledge?

A. Well, I didn't take it myself to the bank, but my partner took it to the bank.

Mr. Hepp: Just a moment. I object. That is hearsay. I think he responded he didn't take it to the bank.

The Court: The objection is sustained beyond the fact that you don't know what happened after the week-end.

Mr. Plummer: May I ask one further question, your Honor.

The Court: Very well.

Q. (By Mr. Plummer): Did you see it after the Labor Day week-end around your establishment?

A. Yes.

Q. And what was the occasion for you seeing it, sir?

A. Well, I come down to work, I think it was probably Thursday, and the check was back from the bank. Our bank is not the First National Bank. Our bank is the Bank of Alaska and it takes a couple of days to process it through the bank and I don't remember which day it was of the week.

Q. And was the check honored when presented for payment, sir?

A. No, it was deducted from our account.

Mr. Plummer: May I approach the witness, your Honor. [73]

The Court: You may.

(Testimony of Ivan Barton.)

Mr. Plummer: I offer what has been marked for identification only as Plaintiff's Exhibit No. 10 in evidence.

The Court: Is there any objection?

Mr. Hepp: We object to it and we'd like to ask some questions of this witness.

The Court: You may do so.

Q. (By Mr. Nesbett): Mr. Barton, what hours or shift did you work over that Labor Day week-end? A. From 5:00 until closing.

Q. 5:00 p.m. until closing? A. Yes.

Q. That would be until 1:00 a.m.?

A. Well, I think it was 2:00 a.m.

Q. 2:00 a.m., and on what days did you work? All the days? A. All the days.

Q. All the days of that holiday week-end?

A. All the days.

Q. Now, you have known the defendant Charles Smith for a long time, haven't you?

A. No, I haven't.

Q. Well, haven't you known him in the construction industry, his superintendent, co-workers for a number of years?

A. No, I haven't known him personally. [74]

Q. You have known of him, is that right?

A. Well, I don't think I even knew of him that I know of.

Q. Do you remember yourself taking this check in and giving cash for it?

A. I don't remember of taking that check and giving cash for it.

(Testimony of Ivan Barton.)

Q. You cash lots of payroll checks there, don't you? A. Yes, quite a few.

Q. At the Union Club? A. Yes.

Q. As a matter of fact, you advertise over the radio, "Come to the Union Club. We cash payroll checks", don't you? A. That is right.

Q. And you don't remember this check at all, do you?

A. I remember the check. Surely, I remember the check. It comes back from the bank and you have to pay the bank \$177.00 for it, you sure remember.

Q. That is your only connection with this check, isn't it? A. Except cashing it.

Q. You remember cashing it yourself?

A. Well, it was cashed in the place.

Q. But you, yourself didn't? You don't remember cashing it yourself, do you?

A. I don't remember cashing it.

Q. No. Now, have you talked to Mr. Plummer prior to coming [75] into court today about Wendell R. Ware? A. Yes.

Q. And when did you last discuss Wendell R. Ware with him?

A. Well, I don't think I discussed Mr. Ware recently with Mr. Plummer. I did with his assistant, I guess it is, in his office.

Q. I see. Well, when did you discuss Mr. Ware with Mr. Plummer's assistant?

A. This week sometime, last week. Latter part of last week. I think it was Thursday.

(Testimony of Ivan Barton.)

Q. Last Thursday. Now, Mr. Barton, have you discussed the case at all with Mr. Plummer or his assistant since last Thursday?

A. Except, I think it was yesterday.

Q. You discussed it with him yesterday, didn't you?

A. He told me the things about the court that I would be asked; not particularly about the check.

Q. And where was that discussion had, over in his office?

A. Over in his office.

Q. And was Sgt. Laird here present?

A. I don't think so.

Q. You did, of course, discuss Mr. Smith and how he appeared and so on, did you not?

The Court: Pardon me. Now you are going into cross examination here. This is for the purpose of admission or denial [76] of admission of this check.

Mr. Nesbett: Well, I thought that he was through with his direct.

The Court: But then the only thing before the court is the admissibility or inadmissibility of the check.

Mr. Nesbett: I see. All right, your Honor, I am sorry. I will confine it strictly to the check.

The Court: Very well.

Q. (By Mr. Nesbett): Then you, yourself don't remember this check coming across the counter of the Union Club? Your only recollection or remembrance of it, you say, as partner there you had occasion to notice it came back from the bank, is that right?

(Testimony of Ivan Barton.)

A. No. I know it come across the counter while I was on shift so I must have cashed it because the checks cashed in the day time by my partner, he bales them up. When I come down it is an empty box. It was in the bale of this cash from the night shift.

Q. So you must have cashed it?

A. I must have cashed it.

Mr. Nesbett: I have no further questions on the check, your Honor.

The Court: Mr. Hepp, do you have any questions on the check itself?

Mr. Hepp: Mr. Nesbett has covered the field I wanted. [77]

Mr. Plummer: I renew my offer, your Honor.

The Court: Is there objection?

Mr. Nesbett: I certainly agree with Mr. Hepp's objection. The objections stands, must be ruled on.

The Court: Objection overruled. It may be admitted and marked Government's Exhibit No. 10.

Mr. Plummer: I have no further questions, your Honor, of Mr. Barton.

The Court: Could you advise the court as to which count?

Mr. Plummer: I am sorry, your Honor. This is Check 8895 mentioned in Count No. 4 of the indictment.

The Court: Thank you. Now, you may cross examine Mr. Nesbett.

Cross Examination

Q. (By Mr. Nesbett): You don't remember

(Testimony of Ivan Barton.)

or five feet from the little counter where we used to cash checks.

Q. Well, did you call a person over and ask him about the check, [80] is that——

A. No, I didn't. Just to look at his identification.

Q. You came to the conclusion that must have been what happened, is that right?

A. Pardon?

Q. You came to the conclusion you must have done that when you were thinking it over later, is that right?

A. That is right.

Q. Why did you say then in response to the question that you don't remember cashing this check? If you remember a Wendell R. Ware and you remember that this must have been the man, why do you say you don't remember cashing this check?

A. Well, there was four of those checks come in on the week-end and I don't remember which particular check that was, Wendell R. Ware's or the other checks. It was one of those M-K checks.

Q. Now, Mr. Barton, were you told yesterday in Mr. Plummer's office to look for Mr. Smith over at the Elks Club?

A. To look for him?

Q. Yes. A. No.

Q. Were you told where he might be sitting?

A. Yes.

Q. Were you given a diagram of where he might be sitting? [81]

A. No.

(Testimony of Ivan Barton.)

Q. Did you see a diagram or sketch that portrayed the relative positions of persons in the courtroom? A. No.

Q. You were told then where Mr. Smith was sitting, is that right?

A. I was told where he was sitting.

Q. And were you told to take a look at him?

A. No.

Q. You were just told, "There is where Smith is going to be sitting", is that right?

A. I was asked if I knew him, where he was sitting, and I said yes; if I knew his face. I said yes.

Q. Why did they then go on to tell you where he was sitting?

Mr. Plummer: I object to that question. He can't answer that.

Mr. Nesbett: Maybe he can't but I want the court to be aware of it, your Honor.

The Court: Well, the objection will be sustained to that question, but you may rephrase your question and ask if he knows why they told him.

Q. (By Mr. Nesbett): Do you know why the District Attorney went ahead and told you where Smith was sitting when you told him in the first instance that you knew Smith? [82]

A. I don't know why.

Q. You don't know that?

A. No, I don't.

Q. Well, the only logical conclusion would be——

Mr. Plummer: I object to any——

(Testimony of Ivan Barton.)

The Court: Objection sustained.

Mr. Nesbett: I haven't asked the question.

The Court: Excepting this, you are making a statement.

Mr. Nesbett: I will make a question of it.

The Court: The question now attempted to be stated is improper and the objection is sustained.

Q. (By Mr. Nesbett): You indicated some doubt about whether or not you could recognize Smith or Ware, didn't you, to Mr. Plummer before he told you where he was sitting?

A. No, I didn't at all because I knew I could recognize him because I have saw him around town here since—for the last month or two.

Q. Was he pointed out to you when he came to town at all? A. No.

Q. I asked you in the first instance if you hadn't known him for a number of years. You have, haven't you? A. No, I haven't.

Q. But you knew him when you saw him around town?

A. I had already been down to the Marshal's Office. [83]

Q. So you remember it from that incident, is that right? A. Yes.

Q. Well now, why did you go on over to the courtroom after you had talked to Mr. Plummer yesterday?

A. He told me to go—the girl in the office told me to go over to the courtroom.

Q. You wanted to take a look at Smith, didn't

(Testimony of Ivan Barton.)

you? He asked you to take a look at Smith, didn't he?

A. No.

Q. Well, he asked you if you recognized Smith, didn't he?

A. I don't remember him asking that question.

Q. Well, he asked you if you knew Smith, didn't he?

A. He asked me if I knew Smith but not yesterday. That was previous to that.

Q. You said, "Yes, I know him", didn't you?

A. Yes.

Q. Yet he went ahead to take the trouble to tell you exactly where he was sitting in the courtroom, didn't he?

A. I don't remember whether he told me exactly where he was sitting.

Q. Well, I understood now in your previous testimony, Mr. Barton, that he did tell you?

A. Well, he probably did tell me.

Q. Then which is true? He did tell you, didn't he?

A. I don't think Mr. Plummer ever did tell me where he was sitting. [84]

Q. That was his assistant, wasn't it?

A. I think it was his assistant that told me where he would be sitting.

Q. Was it Sgt. Laird here to my right?

A. Over in the Elks, you mean, yesterday?

Q. Yes.

A. Yes, I think Sgt. Laird told me where he was sitting.

(Testimony of Ivan Barton.)

Q. He told you where he was sitting over in the Elks Club, did he? At the Elks Club did Sgt. Laird tell you where Smith was sitting?

A. Yes.

Q. Who in Mr. Plummer's office told you where he would be sitting?

A. I think it was his assistant, probably.

Q. Thin assistant, wore glasses, Mr. Duggar?

A. Well, I don't remember. Somebody told me over there where he would be sitting.

Q. Well, you were told in the office, then by Sgt. Laird over in the courtroom. Now, were you reminded again here today where he might be sitting in the courtroom? A. Uh-huh.

Q. You were? A. Yes.

Q. Who reminded you on that occasion?

A. I think it was Mr. Anderson. [85]

Q. Mr. Anderson?

A. I think his name is Anderson.

Q. Who is he, do you know? Is he in the room? A. He is a City Detective, I think.

Mr. Nesbett: I have no other questions.

The Court: Mr. Hepp.

Mr. Hepp: I just have one question.

Cross Examination

Q. (By Mr. Hepp): This may have been answered, but it has escaped me. If you didn't see this check cashed or have no recollection of it what is your explanation as to how you know who cashed it?

(Testimony of Ivan Barton.)

A. I don't know who cashed it. I know that I cashed it. I mean, I don't know who presented it.

Q. You mean, the person who came in and offered it?

A. I don't know except from recalling instances in cashing checks, that you do in a place, and when it comes back from the bank and I begin to wonder who cashed it, if I knew the people.

Q. So you have wondered into a belief that it may be somebody in this courtroom, is that right?

A. I don't know that it was cashed by this man in the courtroom, but I know that I have cashed checks for him in the place.

Q. Did I understand you to say you don't know whether this check here was cashed by anybody in this courtroom?

A. No, I don't.

Q. You don't know?

A. No, I don't.

Mr. Hepp: Thank you.

The Court: Mr. Kay.

Mr. Kay: Just one question.

Cross Examination

Q. (By Mr. Kay): I believe you went on duty on that week-end at 5:00 o'clock in the afternoon?

A. Yes.

Q. So this check couldn't have been cashed before 5:00 o'clock on Saturday afternoon?

A. That is right.

Q. Is that right?

A. Yes.

Q. It could have been cashed any time after

(Testimony of Ivan Barton.)

5:00 on Saturday [87] afternoon, that night, or on Sunday? A. Or on Sunday.

Q. Or on Monday?

A. No, it was almost certain it was Saturday night, but it could have been cashed Saturday or Sunday.

Q. After 5:00 o'clock on Saturday?

A. Yes.

Mr. Kay: That is all.

The Court: Any redirect, counsel?

Mr. Plummer: No, your Honor.

The Court: Very well.

Mr. Hepp: At this time we'd like to have the court re-rule upon the admissibility of that instrument that is brought in. It has become very evident that the person who has identified it doesn't connect it up with any of the crimes charged in this indictment or to any of the defendants that are here in court.

The Court: Objection overruled. You may step down.

Mr. Nesbett: May I have just a moment, your Honor.

The Court: Yes, you may.

Mr. Plummer: Would you stay available, Mr. Barton, for a few minutes.

Mr. Nesbett: I asked for a moment. I may want to ask him a question.

The Court: Yes.

Mr. Nesbett: No other questions, your Honor.

The Court: Very well. You may step down,

(Testimony of Ivan Barton.)

Mr. Barton. Thanks for coming. You may be excused.

(Thereupon, the witness was excused and left the stand.)

The Court: Another witness may be called.

* * * * *

The Court: Now, Mrs. Burnett, you may come before this lady here.

HELEN BURNETT

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed, counsel.

Q. (By Mr. Plummer): Would you please state your name? A. Helen Burnett.

Q. Do you and your husband have a joint business venture here in the City of Anchorage?

A. Yes, we do.

Q. Would you tell me the name?

A. The Club Bar.

Q. And did you so own it on the Labor Day week-end of 1956? A. Yes, we did.

Q. And do you and your husband both work in the bar? A. Yes, we do. [89]

Q. And were you working there that week-end?

A. Yes, I was.

(At this time a document was handed to defense counsel and thereafter handed back to Mr. Plummer.)

(Testimony of Helen Burnett.)

Mr. Plummer: May I approach the witness, your Honor.

The Court: You may.

Q. (By Mr. Plummer): I hand you, Mrs. Burnett, what has been marked for identification only as Plaintiff's Exhibit No. 11 and ask you if you will tell us what it is?

A. It's one of the checks that I cashed over the Labor-Day week-end.

Q. And would you tell me—reading the heading on the check, the payee, the serial number, and the amount?

A. Morrison-Knudsen Company Check No. 8965 to be paid to the order of Wendell R. Ware in the amount of \$207.26.

Q. Now, do you know who accepted that check on behalf of your establishment?

A. Yes, sir, I did.

Q. And would you give us some of the details, if you recall, when you accepted it?

A. Yes, sir. The gentleman came in, asked me if I would cash a check for him. I said yes if it were a pay check. He handed me the M-K check and the identification badge with his picture on it. I proceeded to cash the check [90] and give him the money and he in turn ordered a drink. I believe he ordered a drink, whiskey and a beer.

Q. Maybe a shot and beer chaser?

A. Uh-huh.

Q. And did he endorse the check in your presence? A. Yes, he did.

(Testimony of Helen Burnett.)

Q. And will you look at the back of the check and did he endorse it with that name?

A. Yes, he did.

Q. Now, this identification card that he presented to you, did that correspond with the face of the man that presented the check?

A. Yes, it had his picture on it.

Q. Now, will you tell us if you see that man in court here today?

A. Yes, I do. He is sitting right over there. The third gentleman in the first row.

Q. That would be this gentleman in the blue suit with the handkerchief in his pocket?

A. Yes, sir.

Q. If his name is Charles E. Smith, is that Charles E. Smith? A. That is the gentleman.

Q. Mrs. Burnett, did you later cause this check to be deposited in the bank?

A. Yes, sir, on the following Tuesday. [91]

Q. And was the check honored when it was presented for payment?

A. It was honored at that time, however, it was later declared to be a forgery and returned.

Q. What bank did you present it to?

A. The First National Bank.

Q. And it was later returned to you and dishonored?

A. This check was not returned to me, no, sir. A photostatic copy was.

Q. And did they advise you at that time why they did not return it? A. Yes.

(Testimony of Helen Burnett.)

Q. Will you tell me why?

A. It was a forged check.

Mr. Plummer: May I approach the witness, your Honor.

The Court: You may.

Mr. Plummer: I am going to offer this in evidence. I show it to counsel again.

(The document was handed to defense counsel.)

The Court: Is there objection?

Mr. Hepp: Just a moment.

The Court: Surely.

Mr. Nesbett: Your Honor, I object to the acceptance of the check into evidence and ask if your Honor would be good enough to reserve your ruling on it until after the cross [92] examination. In view of what happened with respect to the last check, your Honor, we thought if your Honor would delay ruling until after all the evidence is in it might——

The Court: Well, counsel, though we must take these matters as they come up. If we don't it is very easy to forget. I would prefer to follow the customary and standard practice of the court. Now, counsel have leave to interrogate at this time as to the admissibility or inadmissibility of this check only, then you may thereafter cross examine as to other facts. Do you wish to examine at this time?

Mr. Nesbett: I have no desire to examine as to the check.

(Testimony of Helen Burnett.)

The Court: Mr. Hepp?

Mr. Hepp: Well, no. I certainly make an objection at this time and I know the court has ruled.

The Court: Very well. Objection overruled. It may be admitted and marked Plaintiff's Exhibit No. 11.

Mr. Plummer: May I for the sake of the record advise the court and the jury that we are talking about Check No. 8965 which is mentioned in Count 5 of the indictment.

The Court: Thank you.

Mr. Plummer: I have no further questions of this witness, your Honor.

The Court: You may cross examine, Mr. Nesbett. I'd like to suggest to counsel that we have a stipulation from counsel [93] that as exhibits are admitted they may be read in whole or in part at that time and/or counsel may reserve the right to read or refer to these exhibits at a later time in whole or in part or in use in argument to the jury only.

Mr. Plummer: That would be satisfactory with the prosecution, your Honor.

Mr. Nesbett: That is agreeable to the defendant Smith.

The Court: Mr. Hepp.

Mr. Kay: Yes, I will stipulate.

The Court: Mr. Hepp.

Mr. Hepp: Yes.

The Court: Very well. That will be the order. You may proceed, Mr. Nesbett.

(Testimony of Helen Burnett.)

Cross Examination

Q. (By Mr. Nesbett): Mrs. Burnett, did you cash a number of payroll checks in the Club Bar over that particular week-end? A. Yes, I did.

Q. Do you know approximately how many you cashed?

A. No, at this time I wouldn't have any idea.

Q. You do cash quite a number of those payroll checks there, [94] do you not? A. Yes.

Q. For construction people, railroad people?

A. Yes, sir.

Q. You have a set routine that you go through in checking identification cards against the signature, do you not? A. Yes, sir.

Q. Did the card that was exhibited to you contain a signature of the person named Wendell Ware? A. It did.

Q. It had his signature right on the card, did it? A. Yes, sir.

Q. And did you observe that signature?

A. I compared it with the signature on the check, sir.

Q. And you must have been satisfied with the resemblance or you wouldn't have taken the check?

A. Yes, sir, I was. The picture and signature were identical.

Q. Do you recall now about what time of the day this person came to your place?

A. I would say it was approximately 4:30 to 5:00 o'clock in the afternoon.

Q. Of a Saturday? A. Yes, sir.

(Testimony of Helen Burnett.)

Q. And did he order his whiskey and beer before he asked to cash the check or afterwards? [95]

A. No, he asked me first if I would cash the check.

Q. Then you must have been standing in front of the establishment?

A. I was standing at the cigar counter by the safe.

Q. Was there a bartender on duty also?

A. Yes, there was a bartender farther on down the bar.

Q. There were a number of payroll checks presented that week-end, were there not?

A. Yes.

Q. Quite a number?

A. Yes, on holiday week ends there usually is.

Q. Did you observe this person sign the check himself?

A. Yes, I did. I stood in front of him and waited for him to sign it so I could compare the signature.

Q. Did you observe how he signed it or any peculiarities about his signature or the method used to sign it? Was he right handed or left handed?

A. I believe he was right handed, sir.

Q. I see. And was he standing just across the counter from you?

A. Yes, he was.

Q. And did he use your pen or did he have a pen of his own?

A. He used my pen.

Q. How was he dressed?

(Testimony of Helen Burnett.)

A. He was dressed in working clothes with a hard hat. [96]

Q. With a hard hat? A. Yes.

Q. Do you recall the kind of clothes he had on?

A. He had on the usual construction men's clothes. Heavy duty type clothes, you would say.

Q. Well, woolen plaid shirt, say?

A. I believe he had on a sweat shirt, sir.

Q. Sweat shirt? A. I think it was.

Q. And what is a hard hat? You mean a helmet, construction——

A. Yes, the type that many of them are required to wear.

Q. You observed this man pretty closely, didn't you?

A. I observe most of my customers that way.

Q. Do you remember them all that well?

A. Not all of them. Specific instances remind you of specific people.

Q. You happened to remember this particular instance very well? A. Yes, sir.

Q. Well, Mrs. Burnett, you were over in the courtroom yesterday, weren't you?

A. Yes, sir, I was.

Q. And Mr. Plummer asked you to come over, did he not, or someone in his office?

A. Yes, sir. [97]

Q. You were subpoenaed in this case?

A. Yes, I was.

Q. Were you told to look for Mr. Smith or Mr. William—Wendell Ware?

(Testimony of Helen Burnett.)

A. I was told that he should be in the courtroom.

Q. You were told he should be in the courtroom?
A. Yes, sir.

Q. Is that all you were told?

A. Yes, sir.

Q. Is that all?

A. Well, I was told what proceedings would take place, that I would be put on the witness stand and asked questions.

Q. You were just told that Smith or Wendell Ware would be in the courtroom, is that all?

A. Yes, and that I would be asked to identify him.

Q. You would be asked to identify him?

A. Yes, sir.

Q. And were you asked if you thought you would be able to identify him?
A. Yes, I was.

Q. And were you? What did you say?

A. I told them I thought that I could. I identified him in a police line-up sometime ago.

Q. They did go ahead, however, and tell you exactly where he would be sitting, didn't they? [98]

A. Not that I recall, no, sir.

Q. Not that you recall?
A. No, sir.

Q. Don't you want to tell the court and jury everything in that respect? Answer my question fairly now. Did they tell you where he would be sitting?

A. No. They told me that he would be sitting in the courtroom as a spectator.

(Testimony of Helen Burnett.)

Q. Did they tell you where he would be sitting?

A. No. They moved several times while I was there, sir.

Q. Who moved?

A. Well, there was a recess of the court.

Q. Now, to get back to my question, Mrs. Burnett. Didn't they tell you just where Mr. Smith would be sitting when you were over there?

A. Not exactly, no. They told me he would be in the courtroom.

Q. I see. Well, not exactly, but did they tell you approximately where he would be sitting?

A. I believe they told me he would be sitting on the same side as the counsel were sitting.

Q. And you believe they told you that. Well, they did tell you that, didn't they?

A. They told me he would be in the courtroom probably on the side of the counsels. [99]

Q. And didn't they show you a diagram, rough layout of the courtroom——

A. No, I asked——

Q. Pardon me. (continuing) ——at approximately where the counsel and the parties would be sitting?

A. Before I went up I asked them how the court was situated in the Elks Hall because I am aware or acquainted with the building and they explained to me how the deal was set out.

Q. Well, how did they happen to mention to you that Smith would be sitting in there behind counsel?

(Testimony of Helen Burnett.)

A. I wouldn't know, sir, how those things are brought up.

Q. Well, you must have asked where he would be sitting?

A. I asked them the layout of the court and they explained to me he would be there or possibly behind counsel's table.

Q. That was in response to your request and they gave you the information that you wanted, didn't they? A. Yes, sir.

Q. As a matter of fact, Mrs. Burnett—rather, I will ask you this: Did Mr. Plummer give you that information in his office as to the layout in the courtroom? A. No, he did not.

Q. Was it Mr. Duggar? Do you know him by name?

A. I don't believe I saw Mr. Duggar yesterday.

Q. Was it Sgt. Laird here?

A. No, it wasn't. [100]

Q. Someone in Mr. Plummer's—

A. It was one of the boys that were instructed to tell me where to go and what time. I believe his name is Anderson, isn't it?

Q. Mr. Anderson?

A. I believe that is his name, yes.

Q. Now, after you arrived in the courtroom yesterday—that was yesterday morning, wasn't it?

A. No, that was yesterday afternoon.

Q. And about what time did you arrive there? Right at 2:00 o'clock when the court—

(Testimony of Helen Burnett.)

A. I arrived just as you were picking the final alternate witness.

Q. Did you have occasion to confer with Mr. Anderson there in the courtroom or Sgt. Laird?

A. I don't remember. I think it was over in Mr. Plummer's office.

Q. Well, I am speaking now of the courtroom after you came there shortly after 2:00?

A. No, I conferred with no one there.

Q. Did any one of Mr. Plummer's staff or his assistants point out to you then at that time where Mr. Smith was sitting? A. No, they did not.

Q. You had only the instructions that were given you in [101] the office as to where he would be sitting? A. Yes, sir.

Q. Did they tell you how he would be dressed?

A. No, I don't recall that they did.

Q. Well——

A. They asked me if I was sure I could identify him and I said yes. He has a very distinctive face.

Q. I didn't ask you that. I asked you if—didn't you have some doubt? Didn't you ask a question that would cause them to say, "He is going to be sitting right behind counsel"?

Mr. Plummer: I object to the question as having been asked and answered at least four times in the cross examination.

The Court: Well, this is cross examination. The court must afford counsel reasonable latitude. I

(Testimony of Helen Burnett.)

will permit counsel to ask this once more. You may proceed.

Mr. Nesbett: Thank you, your Honor.

Q. (By Mr. Nesbett): Didn't you ask the question of Mr. Plummer or his assistants that would cause them to take the trouble to explain to you the courtroom layout in the Elks Club and where Smith would be sitting?

A. Yes, sir, to the extent that I have told you. I asked them how the courtroom was layed out and where I would have to [102] go and they in turn explained to me where the counsels tables were and how the seating was and that Smith would undoubtedly be sitting behind counsels table.

Q. Your main question was only what is the courtroom layout and they took the trouble to explain to you exactly where Smith would be sitting, is that right?

A. No, they didn't tell me exactly where Smith would be sitting.

Q. They told you he would be sitting behind counsel, however, is that right? A. Yes, sir.

Q. Now, didn't you talk with Sgt. Laird or someone in that courtroom after you got there after 2:00 o'clock yesterday and before the witnesses were asked to leave concerning Mr. Smith's location?

A. No, I did not.

Q. You talked with the other witnesses who were with you about it?

A. I came in alone, sir.

Q. But you were sitting with the other wit-

(Testimony of Helen Burnett.)

nesses? A. No, sir, I was sitting alone.

Q. Didn't you talk——

A. Until my husband came in.

Q. Did you talk to Mr. Barton when you were in there?

A. I talked with Mr. Barton out in the ante-room after we [103] were excluded from the courtroom.

Q. And you both checked on who Smith would be at that time, didn't you?

A. Yes, at that time.

Q. You didn't——

A. We had already been excluded from the courtroom.

Q. Did you take any other of these M-K checks over that week-end? A. Yes, sir, one more.

Q. One other one? A. Yes, sir.

Mr. Nesbett: I believe that is all, your Honor.

Mr. Hepp: I have no questions.

The Court: Mr. Kay.

Cross Examination

Q. (By Mr. Kay): Mrs. Burnett, you are pretty sure about the time? It was late in the afternoon on Saturday? A. Yes, it was.

Q. Wouldn't have been any earlier than 4:00 o'clock Saturday afternoon?

A. I don't believe it would have been any earlier probably [104] than 3:30 because I don't usually start working until that time on Saturday afternoon.

(Testimony of Helen Burnett.)

Q. No earlier than 3:30 Saturday afternoon?

A. Yes, sir.

Mr. Kay: Thank you.

The Court: Any redirect?

Mr. Plummer: Just one question.

Redirect Examination

Q. (By Mr. Plummer): Mrs. Burnett, is there any doubt in your mind that this is the gentleman that passed the check in your establishment on that date?

Mr. Kay: Object as leading, suggestive, highly improper.

The Court: Objection overruled.

Mr. Plummer: Would you read back the answer. I thought I heard you answer. Would you answer the question?

A. There is no doubt in my mind. That is the gentleman.

Mr. Plummer: Thank you. I have no further questions.

The Court: Any recross? If not, then you may step down. Thanks for coming. You may be excused.

(Thereupon, the witness was excused and left the stand.) [105] * * * * *

February 24, 1958

Proceedings

* * * * *

Mr. Plummer: I ask that the Bailiff then call Mr. Edward Harkabus.

EDWARD J. HARKABUS

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

Q. (By Mr. Plummer): Would you please state your name, sir?

A. Edward J. Harkabus, H-a-r-k-a-b-u-s.

Q. You anticipated my next question.

The Court: Thank you; that's very important to the Court Reporter and In-Court Deputy as well as the Court.

Q. (By Mr. Plummer): Where do you live, sir? A. Fairbanks, Alaska.

Q. Now, do you know the Defendant in this case, Charles Edward Smith? A. I do.

Q. Now, did you have the occasion to see the Defendant Charles Edwards Smith on March 17, 1957? A. I did.

Q. And would you be good enough to tell us where you saw him? [108]

A. King County Jail in Seattle, Washington.

Q. And do you recall about what time of the day it was?

A. Roughly around two—two-thirty in the afternoon.

Q. And do you recall what day of the week that was? A. That was on a Sunday.

Q. And did you see him by yourself, or was there somebody with you when you saw him, or somebody with you?

A. I was present, Mr. Smith was present, Lt.

(Testimony of Edward J. Harkabus.)

William Trafton of the Territorial Police and Chief—or, excuse me, Special Deputy U. S. Marshal, Ted Pass was also present.

Q. And was there anybody else present at the time? A. For part of the time, yes.

Q. Did you have an occasion to interview him on that occasion? A. Yes, I did.

Q. And did he make any statements to you regarding his participation of the Morrison-Knudsen check swindle over the Labor Day weekend in 1956?

Mr. Nesbett: I will object to that and ask permission of the Court to approach the bench.

The Court: Motion granted.

(Thereupon, the following proceedings were had out of the presence of the Jury:)

Mr. Nesbett: Your Honor, I object to questioning along these lines, while the Defendant was in custody at the time. I notice an attempt to introduce the statement, after the answering [109] of this question, I assume, and the statement would be the best evidence, and I want to hear him on the statement because I have reason to believe, I have strong reason to believe that the statement was taken under grounds that would cause it to be inadmissible on the ground coercion was taken before he was arraigned and on a promise——

The Court: Very well, the Court then in conformance with the Rules and Practice will excuse the Jury and will try the admissibility or inadmissibility of the statement.

(Testimony of Edward J. Harkabus.)

Mr. Nesbett: Could the hearing be held in chambers, or with the spectators out of the courtroom? I know that it's very difficult, as your Honor realizes, by not keeping the jurors from the hallway, it will not keep from them any of the proceedings and——

The Court: Well, I am concerned about excluding all spectators on the Constitutional ground of a public trial.

Mr. Hepp: If I may say a word, as far the Defendant Wright is concerned, I will waive his rights. In fact, he will personally waive his right to have a public hearing in the sense that that word is used in connection with the hearing on the statement.

The Court: Will you waive that, also, as to your Defendant, Smith?

Mr. Nesbett: Yes.

The Court: Mr. Kay? [110]

Mr. Kay: Yes, we will waive the Constitutional provision. I do feel that, along with Mr. Nesbett, no matter how hard the Jury tried, I am sure they're all conscientious, it's hard, very hard, for them not to hear gossip and for that reason, I would feel it would be wise to excuse the jurors at this time, so it can be done.

Mr. Plummer: With all due respect to counsel, if it's a Constitutional right to have a fair and public trial, I do not think they can waive it adequately.

Mr. Hepp: I submit to the Court, the Defend-

(Testimony of Edward J. Harkabus.)

ant can waive any right that is his right.

Mr. Plummer: I am sure the cases will show otherwise.

Mr. Nesbett: I am informed, your Honor, that Judge Forbes occasionally holds these in chambers and that is all I know is just hearsay on it. Did you tell me that?

Mr. Hepp: I have never attended a chambers hearing on this question, however——

The Court: Well, I would not, regardless of Judge Forbes or anybody else, I would not want to hold it in chambers.

Mr. Kay: I'd rather have it in open court, too. Facilities are better, including the Court Reporter, and I think it would be crowded in chambers anyway because you have all the Defendants there and as of right, they'd have to be there.

The Court: Yes, as of right. Mr. Plummer, it appears to the Court—now I'd like to have each one of the Defendants [111] come to the bench and state that they will waive their right to a public trial; then, if that is done——

(Thereupon, the Defendants all approached the bench.)

The Court: Mr. Wright, your counsel, Mr. Hepp, states that on this proceeding to determine the admissibility or inadmissibility of the statement of one Mr. Smith, that you will waive your right to a public trial and we will exclude all the spectators for this purpose only; and you understand, Mr. Wright, if this is done, you could not use this

(Testimony of Edward J. Harkabus.)

matter on appeal in the event that it becomes necessary for you to appeal, or if you do appeal?

Mr. Wright: What do my counsel think of it?

Mr. Hepp: Yes, waive your right.

Mr. Wright: Yes, I will.

Mr. Ing: I have the instruction and I will waive that right.

The Court: You understand you couldn't use that on appeal?

Mr. Ing: Yes.

The Court: Mr. Smith, your counsel has indicated that you will waive the right to a public trial for a portion of the case to determine the admissibility or inadmissibility of your statement. Now, I am pointing out to you if you waive this right then you cannot use it as a ground for appeal, you understand that, in the event you desire to appeal? [112]

Mr. Smith: Yes.

The Court: And you do waive that then?

Mr. Smith: Yes.

The Court: Very well, then. Thank you.

(Thereupon, the following proceedings were had in the presence of the jury:)

The Court: For the reasons stated at the bench, the jurors may be excused to go to their jury room and the Court at this time will have to excuse all people in the general courtroom. The only people allowed in the general courtroom will be the Defendants, their counsel, and of course, none of these defendants (indicating Defendants Walker, Taylor

(Testimony of Edward J. Harkabus.)
and Williams)—they're all under bond, aren't they?
And, of course, Mr. Laird may stay in conformance
with the prior rule.

Very well, ladies and gentlemen of the Jury, you may be excused to go to the juryroom. I don't know how long it will take. We may complete it before lunch; we may not. I can't assure you at this time and in the meantime, the Court expects all spectators in the courtroom to absent themselves from the courtroom and the bailiff is instructed to keep all visitors from coming in on this facet of the case.

(Thereupon, the jurors were excused to go to the juryroom and the spectators retired from the courtroom, after which the following proceedings were had:)

The Court: Let the record show all spectators and [113] jurors have been excluded from the courtroom and the only people present are the three defendants, their counsel and the District Attorney, Mr. Laird—or, Sgt. Laird of the Territorial Police, and the court personnel, plus the witness, Mr. Harkabus. You may proceed.

Q. (By Mr. Plummer): Mr. Harkabus, what was your employment over the Labor Day weekend of 19—or,——

The Court: Pardon me, I am sure counsel will not object if I ask for my Law Clerk to come in during this hearing?

Mr. Kay: No, that will be fine.

(Testimony of Edward J. Harkabus.)

The Court: Mr. Gearlings may come in, Mr. Johnson. Now, you may proceed.

Q. (By Mr. Plummer): Would you be good enough, Mr. Harkabus, to tell me what your employment was on March 17, 1957?

A. I was Special Agent with the National Board of Fire Underwriters.

Q. You were not employed by the Government?

A. I was not.

Q. Now, I will ask you if whether you saw the Defendant on March 17, 1957 in the jail in Seattle in the company with—did you say Smith, Pass and Trafton, and yourself? A. That is right.

Q. Now, did you have an interview with him on that occasion? [114] A. I did.

Q. And did he, during the course of your interview, did you mention the Morrison-Knudsen check swindle over the Labor Day weekend in 1956, here in Anchorage? A. I did.

Q. And did Mr. Smith make some statements to you about it? A. He did.

Q. And now, during the course of this conversation, did anybody else come into the picture?

A. There was a Seattle Attorney by the name of John Harris, a former Assistant United States Attorney who was present during a portion of this interview with Mr. Smith.

Q. And was he there for the purpose of representing anybody? A. He was.

Q. Who? A. Mr. Smith.

Q. And subsequent to your interview, and sub-

(Testimony of Edward J. Harkabus.)

sequent to the time that Mr. Harris was there, did you cause the statements, made by Mr. Smith, to be reduced to writing? A. I did.

Q. Did you do that yourself?

A. I did that myself.

Q. And after they were reduced to writing, did you then show them to the Defendant Smith?

A. I did. [115]

Q. Did he read them?

A. He did read them and they were read to him.

Q. And subsequent to that, did you do anything with the statement that you had typed?

A. He signed it. He signed each page with his signature in my presence and I signed it.

Q. Now, this was after he had seen his attorney Richard Smith?

A. That's correct—I believe not Smith—Harris, John Harris.

Q. I'm sorry. I became confused; and I think I got you confused.

Mr. Plummer: I at this time ask that this be marked for identification.

The Court: It may be marked as Government's Exhibit No. 20 for identification, only.

Mr. Plummer: May I show it to the witness before showing it to counsel, just to have him identify it. This is the statement he typed up that day.

The Court: You may do so.

(Testimony of Edward J. Harkabus.)

(Thereupon, the witness was handed the document.)

Q. (By Mr. Plummer): Will you look this over, Mr. Harkabus and tell me what it is, if you know—the item which you now have, which has been marked for identification, only, as Plaintiff's Exhibit No. 20.

A. This is the four-page statement which I typed for Mr. Smith's signature. I recognize it from my own signature on there and from the contents of the statement. [116]

Q. Thank you, Mr. Harkabus. Let the record reflect I am now showing the statement to counsel.

The Court: For my information, Mr. Plummer, how many more witnesses will you call in regard to this statement?

Mr. Plummer: If necessary, I will call, possibly one, two, three, maybe four. It all is depending on the Court's ruling when the objection is made, if in fact an objection is made.

Mr. Kay: Would it be proper for us to inquire who they are?

The Court: Here is what I was getting at. It's been the practice of the Court to hear all witnesses you intend to call during this "out-of-the-hearing-jury" proceeding, and then thereafter, of course, they would be called again. I was trying to gauge my time is why I asked that question.

Mr. Plummer: I am probably optimistic, but I think that the objection which counsel are about to make will be overruled to the extent the hearing

(Testimony of Edward J. Harkabus.)

will be very, very limited, but in the event the objection is sustained, then I will probably call four witnesses, two of which will be very, very short.

The Court: Well, counsel, out of fairness to the Court, I should like to hear more than one witness. That does not impune Mr. Harkabus in any manner, whatsoever; it's just a question of corroboration.

Mr. Plummer: Two of the witnesses I am going to call will be for the purpose of showing that the other witnesses that [117] were there are not available and Mr. Trafton is in fact in Japan at the present time and Mr. Pass who was also present is in a Federal Hospital down in the South someplace.

The Court: Well, will you have then a witness to corroborate Mr. Harkabus' statements?

Mr. Plummer: The witnesses that I will have—the two witnesses that I will have will be to show that subsequent to arraignment—if I may pursue this while we're talking—subsequent to arraignment, both here and at Seattle, that Mr. Smith, the Defendant, did as a matter of fact, say that the statement was true and further, that he made that statement to the police officers and took them out and showed them different places he went to, mentioned in the statement, and further, that he then went to——

Mr. Nesbett: If he is going to call witnesses to that effect, I'd say the best evidence is the testimony of those witnesses.

Mr. Plummer: That is the reason I am trying

(Testimony of Edward J. Harkabus.)

to be helpful to the Court in response to the Court's question. I am answering the Court.

Mr. Nesbett: I realize that, your Honor, yes.

The Court: Well, I am concerned. Are you going to call another witness who was there at the same time as Mr. Harkabus?

Mr. Plummer: There are no other witnesses available.

The Court: What about this Mr. Harris, the attorney? [118]

Mr. Plummer: I guess he is probably down in Seattle, but he is not under Government subpoena.

The Court: Well, thank you. There is nothing we can do but proceed, I suppose.

Mr. Nesbett: Well, your Honor, I know I will be reading this until noon (indicating the Government's Exhibit No. 20). Maybe your Honor could be guided accordingly as far as the jury and the Court are concerned.

The Court: It appears to the Court, Mr. Plummer, that we best take our lunchtime recess in light of that. I have a number of matters set down for 1:30. I wonder if we shouldn't ask the jurors to come back at 2:30 in the event we may have covered this problem satisfactorily to the Government?

Mr. Plummer: To the Government, yes.

Mr. Nesbett: I don't think that will be time enough. Did your Honor mean to commence this trial at 1:30?

The Court: No, 2:30.

(Testimony of Edward J. Harkabus.)

Mr. Nesbett: I would say 3:00 o'clock at the earliest.

The Court: Will you please call the jurors down so the Court can properly instruct them?

(Thereupon, the Court Bailiff left the courtroom to bring the jurors back into the courtroom, after which, the following proceedings were had in the presence of the jury:)

The Court: Let the record show all the jurors are back and present in the courtroom. Ladies and gentlemen, this matter [119] is going to take considerable time to develop and determine; therefore, the trial of this case will be continued until 2:00 p.m. this afternoon, but you are excused until 3:00 p.m. this afternoon. As you know, I must instruct you at this time not to discuss this case among yourselves, nor are you permitted to let others discuss it with you. You may now be excused and this Court will go into recess until 1:30.

(Thereupon, at 12:00 o'clock a.m., February 24, 1958, the court continues the cause to 2:00 o'clock p.m. of the same day.)

(At 2:00 o'clock p.m., February 24, 1958, counsel for Plaintiff being present and counsel for the Defendants being present, the trial of said cause was resumed and the following proceedings were had, out of the hearing of the jury and the spectators:)

The Court: You may proceed, Mr. Plummer.

Q. (By Mr. Plummer): Thank you, your Honor. Was it your testimony, Mr. Harkabus,

(Testimony of Edward J. Harkabus.)

that you were present at all times and in fact typed up the certificate marked for identification as Plaintiff's Exhibit No. 20? A. It is.

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

(Thereupon, Mr. Plummer approached the witness.) [120]

Q. (By Mr. Plummer): And was it your testimony this morning, sir, that before the statement was typed and signed by Mr. Charles E. Smith, that he had an attorney come there to help him?

A. Yes.

Q. Now, was there at any time any threat made to Mr. Smith? A. No.

Q. Was there at any time any promise made to Mr. Smith? A. No, sir.

Q. Now, would you tell me, if you know, that the—if the Defendant Smith was arraigned on this charge down in Seattle? A. He was.

Q. And do you know the date he was arraigned?

A. March 18, 1957.

Q. Now, subsequent to the arraignment, did you—or, prior to arraignment, did this Defendant waive extradition?

A. I was informed that he had, yes.

Q. Well, did you return to the Territory of Alaska with this Defendant? A. Yes, I did.

Q. And do you know what date that was?

A. It would have been the 21st day of March, 1957.

(Testimony of Edward J. Harkabus.)

Q. And did you ride on the same plane with him? A. I did.

Q. And could you tell us, if you recall, how you were seated in [121] the plane?

A. Well, a portion of the time, as I recall, I sat adjacent to the Defendant, Mr. Smith, and we engaged in conversation at that time.

Q. That would be two-abreast, sitting, and you were seated with him? A. Yes, sir.

Q. Did you talk to him about the contents of the statement at that time?

A. We mentioned it, yes.

Q. And do you recall what his statements were in regard to the statement?

Mr. Nesbett: I will object to that. After all, we are only concerned with one thing at the moment and that is this particular statement that was written and is being offered in evidence, as I understand it.

The Court: That is correct, Mr. Plummer.

Mr. Plummer: This conversation has to do with this statement that we are offering in evidence now, Plaintiff's Exhibit No. 20, your Honor.

The Court: Well, would it go to the admissibility or inadmissibility of that statement?

Mr. Plummer: I think it probably would go to the admissibility of it if it does get in. Of course, the Jury is gone—if the court thinks— [122]

Mr. Nesbett: I will withdraw the objection.

The Court: There is nothing before the Court. You may proceed.

(Testimony of Edward J. Harkabus.)

Q. (By Mr. Plummer): Tell me what he said in regard to the statement at that time?

A. I asked him if he knew any more than he had incorporated in his statement, if he had any additional details, and he said no, that as far as he could recall that this was in fact what had happened in his participation in the M-K check deal.

Q. And you made no threats or promises to him on that occasion? A. I did not.

Q. Now, do you recall whether or not this Defendant was arraigned after he got back to Anchorage on the same charge?

A. I was informed that he was, but I don't know of my own knowledge.

Q. I would ask the Court to take notice of its own files, look at the Held To Answer papers which will show that this Defendant was arraigned in Commissioner's Court, advised of his rights by Commissioner Warren Colver on March 21, 1957, at Anchorage.

The Court: The Court will take judicial notice then of its own records.

Mr. Plummer: Thank you, your Honor.

The Court: You may proceed. [123]

Q. (By Mr. Plummer): And, following the date I just mentioned, did you have an occasion to see this Defendant in my office? A. I did.

Q. And who else was present, if you know?

A. Mr. Pass and yourself.

Q. And what, if anything, did I do at that time

(Testimony of Edward J. Harkabus.)

with regards to this Plaintiff's Exhibit No. 20 that you had in your hand?

A. Well, my recollection is that you went over the statement here where—and it was reaffirmed by the Defendant, Mr. Smith, and additionally——

Q. Did I have a conversation with him?

A. Yes, you did.

Q. And would you tell me what that conversation was?

A. Well, the conversation was to the effect “do you have any additional knowledge other than that contained in the statement concerning the M-K check scheme”.

Q. And do you recall what the Defendant's answer was?

A. He said, “no, sir; it's all in the statement”.

Q. And did we have any further conversation at that time and place in your presence?

A. Well, my recollection is that the Defendant indicated to you at that time that he wanted to plead guilty to this charge and to begin service of his sentence immediately so he'd get it over with.

Q. Yes, sir. Now, did you have occasion to see the Defendant at a later time? A. I did.

Q. And would you tell us when that was, sir?

A. That would have been March 27, 1957.

Q. And would you tell us where that was?

A. It was Territorial Police Headquarters.

Q. And will you tell the Court who was present during that time you saw him, at the time you saw him?

(Testimony of Edward J. Harkabus.)

A. At the time I saw him, at the Territorial Police Headquarters, Officer Ed Dankworth, poly-graphic examiner for the T. P. was there, where we had an interview with Mr. Smith concerning another matter.

Q. Was there any conversation about Plaintiff's Exhibit No. 20 at that time? A. There was.

Q. And would you tell us what that was, sir?

A. Well, in effect, Mr. Smith reiterated the veracity of the statement at that time.

Q. And did you have occasion to see him on another time in the company with anybody else?

A. Well, that same date that I have mentioned, on March 27th, I was with Mr. Smith and Sgt. Laird of the Territorial Police and Mr. Pass, I believe, and we used the statement; we went over the statement in detail to attempt to ascertain the [125] places that had been visited by Mr. Smith during the course of his passing the bogus checks and the subsequent actions of Mr. Smith when he got rid of the merchandise that he had picked up during the course of this swindle, check swindle, and Mr. Smith, at that time, was very cooperative in attempting to show us the various locations of the roads and so forth, but it was rather difficult inasmuch as I believe there was still snow on the ground, or something to that effect, but we did go around to the various places that are indicated in this statement.

Q. Now, did—were any threats made to him on that occasion? A. No, sir.

(Testimony of Edward J. Harkabus.)

Q. Were any promises made to him on that occasion? A. No, sir.

Mr. Plummer: I have no further questions to ask this witness. I will ask leave of court however, that after the cross examination—after he has been excused, if the Court finds it necessary, I will want to recall him to—after we have elicited all the information on it.

The Court: For that purpose, you may do so. You may proceed, Mr. Nesbett.

Cross Examination [126]

Q. (By Mr. Nesbett): Mr. Harkabus, when was the first date that you first saw Mr. Smith?

A. The first date that I saw Mr. Smith would have been approximately March 15th of 1957. I may have seen him in Fairbanks prior to that time, but I had no reason to see him.

Q. In connection with this case, it was approximately March 15th of 1957, is that right?

A. That's right, sir.

Q. And was that in Seattle?

A. That was in Renton, Washington.

Q. In Renton. Are you sure that was the 15th; you said "approximately", and I was wondering if you could be certain that it was that?

A. I am certain it was that.

Q. What day of the week was it?

A. The 15th I believe was a Friday.

Q. And where did you see Mr. Smith on that date, first?

(Testimony of Edward J. Harkabus.)

A. Well, where I saw him was at his residence at 11815 - 78th South Avenue, Renton, Washington. Mr. Smith—I was in the vehicle of the King County Sheriff's Office.

Q. I just asked you where you saw him; you have answered the question.

A. All right, sir.

Q. Did you have occasion to go into the residence at that [127] address you recited?

A. I did not. (The witness answered simultaneously and prior to the completion of the question.)

Q. Will you wait until I finish the question before you attempt to answer it? Mr. Harkabus, did you attempt to go into the residence at that address? A. No.

Q. Did you ever go into the residence at that address? A. No, sir.

Q. Who was with you on that occasion?

A. It was Lt. Wayland of the King County Sheriff's office and Special Deputy Marshal Ted Pass, Lt. William Trafton—

Q. Well, Lt. Trafton was a member of the Territorial Police in Alaska, was he not?

A. Yes, sir.

Q. And Mr. Pass was a member of the Anchorage Police force, is that right?

A. Well, my information was that he was a Special Deputy U. S. Marshal, Mr. Nesbett.

Q. I see, and you were Special Deputy for the Fire Underwriters?

A. No, I am Special Agent with them.

(Testimony of Edward J. Harkabus.)

Q. Special Agent? A. Yes, sir.

Q. And Wayland was with the Sheriff's Office there?

A. King County's Sheriff's office. [128]

Q. You all three traveled in the same car to the address in Renton, didn't you?

The Court: You——

A. We did.

The Court: You mean all four, don't you, counsel?

Q. (By Mr. Nesbett): All four, excuse me—including the Sheriff's Deputy—all four of you traveled to that address in Renton?

A. Yes, sir.

Q. And did any one of you four have a warrant for Mr. Smith's arrest?

A. I believe that Mr. Pass had the warrant.

Q. You believe that he had it. Did you see it?

A. Yes, I did.

Q. You saw it? A. Yes, sir.

Q. And what did the warrant indicate the reasons were for arresting Mr. Smith?

A. Well, I believe it was for forgery, offhand. I didn't look at it in detail. In fact, my recollection is that I just saw it in a passing glance.

Q. What were you doing with that group anyway? Aren't you ordinarily concerned with fire losses and such?

A. Fire losses and other losses, Mr. Nesbett.

Q. And are you ordinarily connected with crime investigation [129] other than arson?

(Testimony of Edward J. Harkabus.)

A. Yes.

Q. How did you happen to be with these three officers on that date?

A. I happened to be with them because I was conducting another investigation and I desired to interview Mr. Smith and the reason that I was with them was that there was a Marshal's party that was leaving from Fairbanks and that I was sent out as a guard for them.

Q. So that put you in Seattle, is that right?

A. That's right.

Q. And you were investigating another matter and you wanted to go along with these officers on that day to see Mr. Smith?

A. That is right.

Q. Now, to get back to the warrant, did you actually see and read the warrant?

A. I didn't read it, no.

Q. Did Officer Pass ever show it to you?

A. Yes, he did.

Q. And where did he show it to you?

A. Well, I believe that I saw it when he—I am not sure of this point, now I believe he read it to Mr. Smith. If it wasn't at Mr. Smith's residence, I believe that he read it to him at the King County Jail, or, the Sheriff's Office, rather, not the King County Jail. [130]

Q. You went into the residence then, didn't you?

A. No, I didn't go into the residence.

Q. You didn't go into the residence at all?

A. No, sir.

Q. What preliminary steps were taken by the

(Testimony of Edward J. Harkabus.)

King County Sheriff's Office with respect to determining whether or not Mr. Smith was at home at that address on that date?

A. I believe that Lt. Wayland radioed to the dispatcher at King County and requested that he make a pretext call to Mr. Smith to ascertain whether or not he was home at that time.

Q. And it was determined that Mr. Smith answered the telephone so the officers then went up to the door of the residence, isn't that right?

A. Yes, sir.

Q. And where were you?

A. Well, I was by the vehicle in the drive-way.

Q. And rather short, fifteen to twenty feet from the door, were you?

A. Well, in actuality, there was no door. It was boarded over was my recollection of it.

Q. The door was boarded over?

A. I believe so; that was in the front portion.

Q. Where did they go, to the rear door?

A. I assume they did.

Q. Did you get out of the car at all? [131]

A. I got out of the car, yes.

Q. Did you walk toward the rear door?

A. Well, I was near the car. I mean, I may have walked toward the front fender, but I mean, as far as entering, if that is what you are implying, why, I didn't.

Q. Well, don't be concerned with what I am implying, just answer the question. Where did you go when you got out of the car?

(Testimony of Edward J. Harkabus.)

A. I got out of the car and I was in the driveway, Mr. Nesbett.

Q. Well, were you standing next to the car or away from the car?

A. I was standing adjacent to the car.

Q. You could see the doorway from where you were standing?

A. Yes, sir.

Q. The three other officers went to the doorway, did they?

A. No, they went to the rear of the house.

Q. Well, there was a door there, wasn't there?

A. Where?

Q. There was a door at the rear of the house, wasn't there?

A. Well, I don't know if there was or not. I would assume there was.

Q. Well, you said you could see them from where you stood. Now, could you see a door or not?

A. I said I could see the door from where I stood.

Q. All right, the three officers went to the door, did they not? [132]

A. Not to the door I could see. They went up to the driveway beyond my range of vision.

Q. When—then you couldn't see how or where they entered that house, is that your testimony?

A. Yes.

Q. Did you overhear anything that occurred before they entered?

A. No.

Q. You didn't overhear a thing. How far were

(Testimony of Edward J. Harkabus.)

you from the point where they entered the house, if you can estimate?

A. Well, if I don't know where they entered the house, it would be hard for me to tell you that.

Q. Well, don't argue with me. Can you tell me yes or no? Can you judge that distance or not?

A. Will you repeat?

Q. Can you estimate that distance from where you were standing to where they entered the house?

A. Well, I could estimate the distance toward the rear end of the driveway.

Q. All right. How far is that?

A. Maybe fifty feet.

Q. Fifty feet? A. Something like that.

Q. Then you were fifty feet from the door at the time the three officers disappeared from your view, is that about it?

A. That is about right. [133]

Q. And they disappeared in the direction of the house so that the entrance would be somewhere beyond fifty feet from you, is that right?

A. I would say so, offhand.

Q. You — did you overhear anything they said before they entered?

A. No, sir, not to my recollection, I didn't.

Q. Did you overhear Mrs. Smith say that "Charles Smith is not here"? A. I did not.

Q. You didn't hear anything else? (Pause.) You heard the Sheriff — King County Sheriff's Officer announce his identity?

(Testimony of Edward J. Harkabus.)

A. I am sure he identified himself; I believe I did hear that.

Q. You did hear that?

A. I believe I heard it.

Q. And did you hear him ask if Mrs. Smith—if Charles Smith was there?

A. No, sir, I didn't.

Q. Well, didn't you listen after you heard the first remark?

A. Well, I am not even positive that I heard it. I would assume that he did announce his identity. That's the only——

Q. You know, as a matter of fact, Mr. Harkabus, that Mrs. Smith, the Defendant's mother said, "he's not here", and that the officer brushed her aside and went straight on in the house, [134] don't you? You don't want to admit it?

A. I do not, Mr. Nesbett.

Q. You don't know that? A. No.

Q. You overheard a part of the conversation; you heard the officer announce his identity, didn't you?

A. I said I believe that I did, yes.

Q. Well, you wouldn't believe that you heard it unless there was some good basis in your memory for thinking that you had heard it, would you?

A. I have already answered your question; I believe that I heard it, Mr. Nesbett.

Q. But you didn't hear another thing that occurred there?

(Testimony of Edward J. Harkabus.)

A. I didn't hear the conversation that you have outlined to me, no.

Q. What did you next see or hear?

A. I believe that he came—that they came out with the Defendant, Mr. Smith.

Q. You believe that they came out with him?

A. Yes, sir.

Q. Well, they did, didn't they?

A. Well, they did in fact.

Q. And is that the next thing you observed after you had heard the officer announce his identity at the door?

A. As far as from where I was, yes. [135]

Q. Who had Mr. Smith in custody of those three officers? A. I believe Mr. Pass did.

Q. And was he handcuffed?

A. I don't recall.

Q. Was Mrs. Smith to be seen yet at all, the Defendant's mother?

A. I never did see Mrs. Smith.

Q. You never did? A. No, sir.

Q. Are you sure you didn't go in that house?

A. I am positive.

Q. But you saw a warrant that Officer Pass had?

A. Well, my recollection was that he showed me the warrant. I can't remember whether it was prior to the time or later at King County Jail. Now, that is what I said.

Q. You aren't sure whether he had a warrant at that time or not, are you?

(Testimony of Edward J. Harkabus.)

A. I am pretty sure he did, or he wouldn't be arresting him.

Q. You hoped he had, but you are not sure?

A. I didn't necessarily "hoped" he had.

Q. You didn't see it prior to their entering the house on that day, did you?

A. Well, I previously testified that I thought that I had——

Q. Well, if you saw——

A. (Continuing) ——and I am trying to——

Q. Go ahead. [136]

A. I am trying to remember exactly. It's been a little while ago, but——

Q. If you saw it later at the King County Jail—can you remember now where the warrant issued, out of which or whose jurisdiction?

A. I believe it was out of Anchorage, out of this Court.

Q. Out of this Court? A. Yes, sir.

Q. And that it was a warrant for the crime of forgery? A. I believe that's right.

Q. You believe that's right?

A. Uttering a false instrument, or something to that effect. I didn't arrest Mr. Smith, so I'd have no idea why or what the full charge is.

Q. I realize that. I am just trying to find out what you remember, if anything. Now, what was done with Mr. Smith by the officers and yourself.

A. Well, he was transported then from his residence there to King County Sheriff's Office.

Q. About what time of day was that?

(Testimony of Edward J. Harkabus.)

A. I'd estimate that we arrived at Mr. Smith's residence around 3:30 or somewhere thereabouts.

Q. Can you estimate approximately when you arrived at the King County Jail?

A. Well, I don't know the exact distance to Renton, but I [137] do recall that we were slowed up quite a bit because of Boeing traffic which apparently has a shift change at that time and just on the assumption that it was around 3:30, I believe it would have been perhaps around 4:30; maybe not that long, maybe half an hour or something like that. I don't know how far it is, actually, to Renton.

Q. Probably 4:30 when you arrived at the King County Jail, approximately?

A. Just roughly I'd say, yes.

Q. What was done then with Mr. Smith, if you know?

A. I believe he was interviewed by Mr. Pass and Mr. Trafton.

Q. Where was the interview conducted?

A. It was at King County or the King County Sheriff's office.

Q. You were present too, weren't you?

A. I believe that I only asked Mr. Smith a couple of questions at that time and he indicated that he didn't have any knowledge of that, so that I wasn't present if you mean throughout the interview, no, sir.

Q. Well, were you present at the commencement of the interview? A. Yes.

Q. And did you ask your questions concerning

(Testimony of Edward J. Harkabus.)

the matter you were investigating before the other officers—— A. No, sir.

Q. (continuing) ——commenced their investigation? A. No, sir. [138]

Q. Who commenced the investigation or interview first, which officer?

A. I believe Mr. Pass did.

Q. I see. How long was Mr. Pass engaged in his interview?

A. Well, after Mr. Pass told the Defendant that he didn't have to make a statement and that he was entitled to the services of an attorney, he went in and began to ask him about his participation, alleged participation, of the M-K check deal and I can't recall how long I was in the room—maybe half an hour.

Q. Then did you have an opportunity then to ask your questions?

A. Yes, I did. I told him that I didn't have too much interest in this other matter and that I wanted to ask him these questions if I could.

Q. Did you ask him? A. I did.

Q. And did he answer? A. He answered.

Q. And did you then leave?

A. I left the room, yes.

Q. You left the room. Was the Defendant and the other officers still there? A. Yes, sir.

Q. The other officers were still interviewing, is that your recollection? [139]

A. Yes, sir.

Q. Did you go back in that interview room that

(Testimony of Edward J. Harkabus.)

day? A. I may have been in there later, yes.

Q. You may have? A. Yes.

Q. Well, don't you recall whether you went in there later or not?

A. Yes, I do recall and I don't believe I re-entered the interview room. I was in the chief deputy's office is my recollection.

Q. Was that the—adjacent to the interview room?

A. Well, it's down the hall from it, yes.

Q. As a matter of fact, didn't you remain in that interview room until late at night, until Mr. Smith finally signed the consent to be extradited?

A. No, sir.

Q. You did not? A. No, sir.

Q. Would you say then that after you arrived at King County Jail, that you left the interview room at approximately 5:00 o'clock or thirty minutes after you got there?

A. I'd say that that is about right, yes, a little after five.

Q. And that you never returned to the interview room that evening?

A. Well, I may have ducked in there or out; I am not sure of that. [140]

Q. Did you take any part in the interview after you had asked your questions?

A. After I left, I don't believe that I did, no, sir.

Q. You don't believe that you did. Is your recollection hazy on that point?

(Testimony of Edward J. Harkabus.)

A. Not particularly.

Q. Now, you have testified, I believe, that Officer Pass informed the Defendant that he was entitled to counsel? A. Yes, sir.

Q. And that he need not make a statement?

A. Yes, sir.

Q. Well, did he come right out and say right at the commencement of the interview, "now, you don't have to make a statement"?

A. He did. He informed him that he didn't have to make it; that he could have the services of an attorney.

Q. You remember that? A. I do.

Q. Very well? A. Yes.

Q. Was the Defendant sitting down or standing up at that time? A. He was sitting.

Q. Where were you in the room with relation to the Defendant?

A. I would have been to the left of him, I believe.

Q. Weren't you sitting at a desk in the room?

The Court: Well, it was a long table what I recall. [141]

Q. (By Mr. Nesbett): You were sitting at the table, weren't you?

A. I wasn't—if you mean was I sitting directly in front of the Defendant, Mr. Nesbett—

Q. Were you sitting at the table, first?

A. I was at the table, yes.

Q. And the Defendant was close by you, was he? A. No.

(Testimony of Edward J. Harkabus.)

Q. Sitting at the table, also?

A. Well, I believe he was on the other side.

Q. Was Lt. Pass standing or sitting?

A. He was sitting.

Q. Were those relative positions maintained for approximately the thirty minutes that you were in there?

A. I believe they were.

Q. All right, now, did you see Mr. Smith again that day that you remember as Friday the 15th, after you had once left the interview room?

A. I don't believe that I did, no.

Q. Mr. Smith hadn't admitted any implication or connection with this M-K matter as of the time you left that room, had he?

A. No.

Q. He had not, had he?

A. No.

Q. Now, when did you next see Mr. Smith?

A. I next saw him on the 17th.

Q. That would be on a Sunday, would it not?

A. Yes, sir.

Q. At about noon?

A. No, I believe it was after that. I had previously testified it was somewhere around 2:00 o'clock, as I recall.

Q. Well, it was afternoon then?

A. Yes, sir.

Q. And who was with you on that occasion and where did you see him?

A. I saw him at King County Jail. Lt. Trafton was with me and Officer Pass.

Q. And are those the only persons?

A. Yes, sir.

(Testimony of Edward J. Harkabus.)

Q. And did you use the same interview room that had been used the day before?

A. No, sir.

Q. Another room?

A. It was another section of the same building but he had been incarcerated in the jail underground.

Q. Over night, he had been in jail over night?

A. Yes, sir.

Q. Now, was the interview continued with Mr. Smith? A. Continued, yes.

Q. Who conducted the interview? [143]

A. Well, there were three of us present and I believe we all took a part in the interview.

Q. Didn't you, Mr. Harkabus, carry the main part of the interview as far as the officers were concerned?

A. I believe that you might say that I did, yes.

Q. You were seated at a table, weren't you, and Mr. Smith was somewhat on your left at the same table? A. Uh-huh.

Q. And Lt. Pass was sitting down to Smith's left, somewhat? A. Well——

Q. Is that about right?

A. Well, no, I believe that Special Deputy Pass was across the table from me and that would have put him on Smith's left.

Q. Smith's left, and Trafton was standing up, wasn't he? A. I believe he was.

Q. And that those were the only persons pres-

(Testimony of Edward J. Harkabus.)

ent when the interview was commenced on Sunday, is that right? A. Initially, yes.

Q. Initially, yes. Now, what was the nature of the interview as far as you were concerned and as far as you participated on that Sunday? Was it in connection with this M-K matter or the matter that you were interested in?

A. Well, it was a little of both.

Q. A little of both? A. Yes, sir. [144]

Q. And was it during that interview that Mr. Smith admitted connection with this M-K thing?

A. Yes, sir.

Q. Now, approximately, how long after he had been in the interview room was it that he made an admission?

A. I believe it was around, roughly, forty-five minutes, something like that.

Q. Now, during that forty-five minutes, were you, yourself, making notations of anything that Mr. Smith was saying? A. I was, yes.

Q. You were making penciled notations, weren't you? A. Yes, sir.

Q. I'll ask you, during that interview, didn't the jailer have occasion to announce that Mr. Smith's attorney was there and wanted to see him?

A. He did.

Q. And did you not tell the jailer "the attorney can see him when we get thru with him"?

A. I did not.

Q. You did not? You deny that, specifically?

A. I do, specifically, and vehemently.

(Testimony of Edward J. Harkabus.)

Q. Right. Now, what happened then after the jailer announced that Mr. Smith's attorney was there?

A. There was some conversation as to whether or not we should continue the interview and I suggested that we let him see [145] his attorney. That was my suggestion.

Q. There was some conversation between whom?

A. Well, Mr. Pass said that he—the jailer initially came up and said when they're booked as a Federal prisoner, something to the effect that their policy at King County was that they didn't let them in unless they—it was all right with the officer or something to that effect, but——

Q. Well, now, don't go too fast and get us confused. The jailer said there was a policy in connection with Federal prisoners, is that right?

A. Yes.

Q. And that policy was what, as you recall it?

A. He stated that——

Q. That is the jailer stated? A. Yes.

Q. Go ahead?

A. He said that, in effect, that unless they wanted to let the attorney in that he was a Federal prisoner or something to that effect and——

Q. We'll stop there. Unless he wanted to let the attorney in——

A. That he didn't have to, something——

Q. The jailer didn't have to? A. Uh-huh.

Q. Is that the way you understood him to remark? [146]

(Testimony of Edward J. Harkabus.)

A. That is the way I took it. I don't know whether that is right, but that is the way I understood——

Q. Well, what—if you know, why did the jailer come and tell you fellows that?

A. I don't know why he did that.

Q. He said, “there is an attorney out here that wants to see the Defendant”, is that right?

A. That's right.

Q. And then he went on to state that, “there is a policy in connection with Federal prisoners that I don't have to let their attorney in if I don't want to”, is that right? A. Something to that effect.

Q. Something to that effect. Well, you didn't want to see the attorney, did you?

A. Not particularly.

Q. Now, you went on with the interview, didn't you? A. Yes, for a few minutes.

Q. For approximately twenty—twenty-two—twenty-five minutes, didn't you?

A. Well, my recollection is that the interview had bogged down at that point and Mr. Pass went to discuss this matter with Mr. Harris, the attorney, and we were more or less holding the interview in abeyance until he came back.

Q. You had, up to that time, been writing down some things Mr. Smith had been telling you, hadn't you? [147]

A. Yes, sir.

Q. In longhand? A. Yes, sir.

Q. You had Mr. Smith almost to the point where

(Testimony of Edward J. Harkabus.)

you thought he was going to sign something, didn't you? Now, just be honest with us.

A. I am trying to remember. Will you ask the question again, please?

Q. You had Mr. Smith at that time almost to the point where you thought he might sign something for you, didn't you?

A. Well, he had already admitted his complicity in the check case.

Q. Well, to get back to the question, you had him to the point where you thought he was almost ready to sign this thing you had been writing on, didn't you?

A. Oh, no, sir, because no one can read my notes. I didn't anticipate him signing that at all.

Q. Well, did you continue to prepare notes and interview Mr. Smith after the first announcement by the jailer?

A. Well, Mr. Pass had talked to the attorney is my recollection, and I don't know what he did say to him, but the attorney did come in.

Q. Well, didn't you hear him talk with the attorney? A. No, sir.

Q. And you stayed with Mr. Smith, did you, while Mr. Pass was [148] talking to the attorney?

A. Lt. Trafton and I were there with Mr. Smith.

Q. Talked with the attorney?

A. No, Mr. Nesbett, Mr. Pass talked to the attorney; Lt. Trafton and I were with Mr. Smith.

Q. Stayed with the Defendant?

A. Yes, sir.

(Testimony of Edward J. Harkabus.)

Q. But you couldn't overhear anything that Mr. Pass said to the attorney, is that right?

A. No, sir, I didn't.

Q. Did the jailer come in any more and make any more remarks about the Defendant's attorney being around?

A. He came in again and said the attorney was still there and I suggested that Mr. Harris come in; that they let Mr. Harris come in and talk to Mr. Smith inasmuch as he was the attorney.

Q. Was that after Pass had been out to see him?

A. Yes, sir.

Q. After Pass went out to see him, the attorney did not come back in, did he? The attorney did not follow Pass back in the room, did he?

A. Yes, he did.

Q. Well, what was the occasion for your suggesting that he allow Mr. Harris to come in then?

A. Well, I thought it was a good idea, that's all.

Q. But if Pass was bringing him in and you didn't overhear what [149] was occurring between Pass and the attorney, why was your suggestion that you made that he be brought in?

A. Well, one of us is confused, Mr. Nesbett, and possibly it's me, but my point was that, initially, Mr. Pass had talked to the attorney and what the conversation was, I don't know. Mr. Pass came back and subsequently, the jailer indicated that the attorney was there and then I stated, "I think it's a good idea for you to let him see him".

(Testimony of Edward J. Harkabus.)

Q. All right. Now, when Mr. Pass came back, the attorney was not following him in?

A. He was.

Q. He was? A. On the second occasion.

Q. On the second occasion? A. Yes, sir.

Q. Did Pass go back out and get the attorney after you suggested that it would be a good idea to bring him in? A. I believe he did.

Q. Well, then what was the occasion for the jailer coming back the second time?

A. Well, you will have to ask the jailer; I don't know.

Q. You don't know? A. No, sir.

Q. Mr. Harkabus, didn't it occur about like this: that during this interview the jailer came and said, "there's an attorney [150] here who wants to see this Defendant", and did you not reply to the jailer, "he can see him when we get thru with him"?

A. I have answered your question previously.

Q. Well, answer yes or no. A. No.

Q. Did the jailer not come back a second time after that and say, "this man's attorney wants to see him, and it's my belief that he has a right to see his attorney"? A. No, sir.

Q. And that you again answered he can see him when we get thru with him? A. No, sir.

Q. You did not? A. No.

Q. And that the next thing that occurred was that the jailer had the attorney standing in the door?

(Testimony of Edward J. Harkabus.)

A. That is not my recollection at all.

Q. You don't recall it that way?

A. No, sir.

Q. Well, it was about twenty minutes after the attorney was first announced that Mr. Pass brought him in then, is that your testimony?

A. That's right.

Q. He got just as far as the door, didn't he—the attorney got just as far as the door, didn't he?

A. What door?

Q. The door entering into the interview room.

A. He was within the door; he had entered the room.

Q. He just got inside the door, then?

A. Well, it wasn't—well, I don't know how far he had been in, but he was in the room.

Q. How far in the room?

A. Well, he was within three feet of Mr. Smith, I'd say, offhand.

Q. And how long was he there?

A. Maybe ten minutes or so—fifteen.

Q. Did you talk with the attorney?

A. Did I talk with him?

Q. Yes. A. No, sir.

Q. Did you carry on your interrogation while the attorney was there? A. No, sir.

Q. You dropped that, didn't you? All of the officers dropped their interrogation, didn't they, while the—— A. Dropped it?

Q. You discontinued your interrogation while the attorney was there, didn't you?

(Testimony of Edward J. Harkabus.)

A. Well, the attorney was talking to Mr. Smith, so obviously——

Q. Well, can't you answer that, Mr. Harkabus? You discontinued [152] your interrogation of Mr. Smith while the attorney was there, didn't you? (Pause) You, yourself, didn't ask Mr. Smith any questions while the attorney was in there, did you?

A. I did not.

Q. Nor did any of the other officers, did they?

A. No, sir.

Q. Now, the attorney asked Mr. Smith, "do you want me to represent you?", didn't he?

A. He did.

Q. And what did Mr. Smith say?

A. He asked him who had sent him.

Q. And who did the attorney say had sent him?

A. He said that his father, Oscar Smith, I believe his name is.

Q. Oscar Smith, the Defendant's father had sent him, Harris, down there, is that right?

A. Yes, sir.

Q. And what else was said?

A. When he asked Mr. Smith if there was anything that he could do for him, Mr. Smith replied, the Defendant replied, that he didn't think so because he had in fact been implicated in this situation and had confessed his complicity.

Q. Smith hadn't signed anything as yet, had he?

A. No, sir.

Q. So, the attorney left, didn't he? [153]

(Testimony of Edward J. Harkabus.)

A. There was a few more words between Smith and his attorney.

Q. Well, then the attorney left, didn't he?

A. Yes, he did.

Q. How—did it take ten minutes for all that to occur?

A. Well, that is my recollection.

Q. Did anyone tell Mr. Smith that he could go out and see his attorney in private if he wanted to?

A. His attorney said, "Do you want to talk to me in private, Mr. Smith", and Mr. Smith replied, "no".

Q. Was his attorney sitting down or standing up? A. He was standing up.

Q. And did the jailer make any remark to Smith about his rights?

A. Not to my recollection, no, sir.

Q. Did you tell Smith, "Go ahead, Smith, you can see your attorney if you want to"?

A. No, sir, I didn't.

Q. Did Pass do that?

A. I don't believe so.

Q. Or, did Trafton?

A. No, sir. He had previously been advised of his rights.

Q. Now, after the attorney Harris left, what then happened in the interview room?

A. We continued to interview Smith for a short time.

Q. That went on for probably an hour and a half, or two hours afterwards, didn't it? [154]

(Testimony of Edward J. Harkabus.)

A. I don't believe so, no, sir.

Q. The result of this interview was that Mr. Smith signed some of these things you had been writing out in longhand, didn't he?

A. No, sir.

Q. Now, we get down to the point: didn't you have Mr. Smith sign some of those pages that you were writing on in your own handwriting in longhand? A. I didn't, no, sir.

Q. You didn't? Who did?

A. Nobody did, to my knowledge.

Q. Nobody did? (Pause) Is it your testimony that nobody had Mr. Smith sign something written in longhand there that day in that room?

A. That's my recollection, no, sir.

Q. Well, could anyone have had him sign something written in longhand there at that time without your knowing it? A. I doubt it.

Q. Then, in all probability your testimony is, is it not, that he didn't sign anything written in longhand there that day?

A. My recollection is that he did not.

Q. How did this statement that has been offered as Exhibit 20 get to be typewritten?

A. I typed it.

Q. Where did you type it? [155]

A. In the King County Sheriff's office.

Q. When?

A. Immediately after the interview with Smith.

Q. Was Mr. Smith with you at the time you typed it? A. I don't believe he was.

(Testimony of Edward J. Harkabus.)

Q. Did you do all the typing yourself?

A. Yes, sir.

Q. Was officer Pass and Trafton with you when you typed it? A. They were.

Q. And that would be the same day, Sunday?

A. Yes, sir.

Q. And when was it taken to Mr. Smith—was it taken to him? A. Yes, sir, it was.

Q. Where was he when it was taken to him?

A. I believe he was in the jail.

Q. The three of you took it to him up to his cell? A. No, not to his cell.

Q. Did you call him out of his cell?

A. I didn't, no, but he had been called out.

Q. Where was he called down to—where was he called?

A. He was called to the same place where the interview was conducted, there.

Q. And about what time of the day would that be? A. I honestly don't know.

Q. Well, would it be late in the evening? [156]

A. No, sir.

Q. Early in the evening? Was it before you had had dinner?

A. Oh, yes; in fact, it was in the afternoon.

Q. In the afternoon? And it was signed in the same interview room then, was it, that you had been in previously that afternoon, with Mr. Smith?

A. I believe so, Mr. Nesbett.

Q. Did you say that you had read the statement over to Mr. Smith? A. Yes, sir.

(Testimony of Edward J. Harkabus.)

Q. Did you read it in its entirety to him?

A. Yes, sir.

Q. And I believe you also testified that he, himself, read it? A. Yes, sir.

Q. Did he read it over page by page?

A. I am sure that he did, yes, sir, because he initialed several corrections on it.

Q. Were you there watching him to see that he read it all? A. Yes, sir.

Q. Have you still got those notes you made?

A. That's a difficult question to answer for this reason: that recently, I was involved in a fire in Fairbanks, your Honor, where many of my records and what-have-you were water-damaged and fire-damaged and, very honestly, I don't know; it may be in salvage records, yes, sir. [157]

Q. Well, you don't know whether your notes were destroyed in that fire or not, is that right?

A. That's right.

Q. Didn't you—don't you, as a rule, turn your notes in with your—with the statement?

A. Well, generally, I don't, no, sir.

Q. To whom did you give the statement then after it had been signed?

A. Well, it was given to Trafton and Pass.

Q. Did you keep a copy for yourself?

A. No, sir, I don't.

Q. And you don't know what happened to your notes?

A. Well, I am not sure of what happened to them, Mr. Nesbett.

(Testimony of Edward J. Harkabus.)

Q. I am looking at Exhibit 20 for identification, Mr. Harkabus—I wonder if I could see the original? My photostat doesn't show very well. May I approach the witness, your Honor?

The Court: Yes, you may.

(Thereupon, Mr. Nesbett approached the witness.)

Q. (By Mr. Nesbett): Now, Mr. Harkabus, is this the statement that you typed, Exhibit 20?

A. Yes, sir.

Q. You typed that yourself?

A. Yes, I did.

Q. And you say you had Mr. Smith sign each page of it himself? [158]

A. Yes, sir. I didn't have him sign it; he signed it.

Q. He signed it? A. Yes, sir.

Q. And in the presence of Trafton and Pass?

A. Yes, sir.

Q. Now, this was taken on a Sunday—that would be the 17th? A. Yes, sir.

Q. Do you know how the date 3/16/57 came to be written on the copy of this statement?

A. Do I know how?

Q. Yes. A. No.

Q. Where is that copy (talking to other defense counsel)? On the photostat that I got off the copy, there is handwritten the date "3/16/57".

Mr. Plummer: I don't think I have anything on that.

Q. (By Mr. Nesbett): I am showing you a

(Testimony of Edward J. Harkabus.)

photostatic copy of Exhibit 20 which was made during the noon hour, Mr. Harkabus. Do you see those figures up in the righthand corner "3/16/57"?

A. Yes, sir.

Q. Do you recall those figures being written in on any copy of this Exhibit 20?

A. I do not.

Q. You have no idea how they might have gotten there? [159]

A. You have the original. That is the one I typed. I know nothing about the photostat, Mr. Nesbett.

Q. The point I am making, Mr. Harkabus, this is a photostat copy that was given to us by the District Attorney and the figures are photostated as well as the typing. I was wondering if you knew how——

A. No, sir.

Q. How many statements were signed by Mr. Smith on that date?

A. I believe there might have been three copies.

Q. Of four pages each? A. Yes, sir.

Q. And did you have him sign all three copies?

A. I believe he did sign all copies, yes, sir.

Q. And you deny vehemently, didn't you say, that he signed any of your handwritten statements or notes?

A. My testimony was that I don't recall that he signed any notes. I don't recall him signing my notes.

Q. Didn't you have him sign your notes, or what you had been writing out shortly after attor-

(Testimony of Edward J. Harkabus.)

ney Harris had left the room and then later take these others in and tell him that they were just typewritten copies of the statement he had already signed? A. Oh, no, sir.

Q. You didn't? A. No, sir. [160]

Q. Do you recall Officer Pass, during the interview on Sunday speaking to Mr. Smith and saying "you better make a statement"?

A. No, sir.

Q. You don't recall that early part of the interview? A. I don't recall it.

Q. Do you recall Officer Pass later saying, "if you go ahead and make the statement it will go a lot easier with you"?—just prior to Mr. Harris being announced?

A. Well, my recollection of anything along that line is this, Mr. Nesbett:—

Q. Well, I'd like to have you answer that question.

A. Will you rephrase your question?

Q. I will have it read back to you.

(Thereupon, the Court Reporter read back the question on Page 161, Line 6.)

A. Your Honor—

The Court: This is cross examination. You should answer the question yes or no.

A. Well, I'd say "no" then.

Q. (By Mr. Nesbett): Why did you hesitate?

A. Well, I hesitated because that isn't what was said.

(Testimony of Edward J. Harkabus.)

Q. What did Officer Pass say to him in connection with making a statement?

A. Officer Pass indicated to him that based on past experience, [161] in the event that he made a statement and a full confession, undoubtedly, it would go easier with him". That was the full context of the remark made by Officer Pass.

Q. That is the context of what Officer Pass said, is that right?

A. I believe that is right, sir.

Q. In other words, he said that, in gist, as best you recall?

A. Yes, sir.

Q. You don't recall exactly what he said, do you?

A. No.

Q. You do not?

A. No, sir.

Q. Mr. Harkabus, now, going back to Saturday afternoon at about 4:45, about fifteen minutes after you had arrived at the King County jail, or approximately that time——

The Court: Pardon me. My understanding was, it was on a Friday.

Mr. Nesbett: I'm sorry, your Honor, that is right; the testimony was Friday. I am glad your Honor reminded me.

Q. (By Mr. Nesbett): Are you sure it was a Friday or Saturday?

A. It was a Friday.

Q. It was a Friday?

A. Yes, sir.

Q. Did you see Mr. Smith at all on a Saturday?

A. I did not, no, sir. [162]

Q. All right. Now, on Friday afternoon, at about 4:45, or approximately fifteen minutes after

(Testimony of Edward J. Harkabus.)

you had arrived at the King County jail, you were in the room with Mr. Smith, that is right, isn't it? A. Yes.

Q. And you had an opportunity to ask him two or three questions, is that right?

A. I asked him several questions.

Q. And then you left the room, is that right? Approximately half an hour after you had gone in?

A. Well, it may have been longer. I am not positive.

The Court: What's the purpose of going all over this the second time, counsel?

Mr. Nesbett: Just laying the groundwork for one question, your Honor, that has been suggested to me and I couldn't ask the question out of the blue.

The Court: I appreciate that, but on the other hand, I thought I had the right to determine why you were going over that again.

Mr. Nesbett: Yes, sir.

Q. (By Mr. Nesbett): Now, so after you had been in the room approximately thirty minutes, you left, is that right, Mr. Harkabus? A. Yes, sir.

Q. And to the best of your recollection, you didn't go back, did [163] you?

A. I don't believe I did, no, sir.

Q. And you don't know what happened or how long they were in the room, after you left, do you?

A. Well, they weren't in there too long. I do know that, because Lt. Wayland had to close his office.

(Testimony of Edward J. Harkabus.)

Q. How do you know whether or not they were in there very long after you left?

A. Well, I was still at the King County jail. I testified to that, that I was in another room, in the chief deputy's room.

Q. Well, all right. If you are so aware and informed of the situation, how long were they in there after you left? A. I don't know.

Q. You don't know?

Mr. Nesbett: That is all.

The Court: Very well. Any redirect, counsel?

Redirect Examination

Q. (By Mr. Plummer): When did you next see——

Mr. Kay: Could I have a chance on cross? I just wanted to ask one question along that line?

Cross Examination

Q. (By Mr. Kay): On Saturday then, I don't want to be repetitious at all, you didn't see Smith at all on Saturday? A. I did not.

Q. Do you know whether Pass and Trafton did?

A. I believe they did.

Q. You don't know how long they saw him or what was said, of course, not being there on Saturday? A. I wasn't there.

Mr. Kay: All right.

Mr. Plummer: Anybody else?

The Court: Now, you may proceed then.

(Testimony of Edward J. Harkabus.)

Redirect Examination

Q. (By Mr. Plummer): Did you, in fact, see Officer Pass and Lt. Trafton after you had left the cell or the interrogation room, or the Defendant Smith after they were conducting their investigation on Friday afternoon?

A. I saw them, yes, sir. [165]

Q. When did you see them?

A. I am not absolutely sure of the time, but I believe it would have been around six or so.

Q. And where? A. 6:30—around 6:30.

Q. Where did you see them?

A. Well, I believe it was in the office of Lt. Wayland of King County Sheriff's office.

Q. So, they were at least out of there by the—about the time you mentioned?

A. I believe they were.

Q. Now, did Mr. Nesbett show you this copy with the "3/16/57" on it? A. He did.

Q. And it was your testimony you didn't know anything about it?

A. I didn't know anything about the photostat at all.

Mr. Plummer: I have no further questions.

The Court: Very well, you may step down.

Mr. Nesbett: May I ask one question, your Honor? It wasn't elicited by the redirect. I was wondering if your Honor would give me permission to ask it in any event. It's based on the direct testimony.

The Court: Yes. [166]

(Testimony of Edward J. Harkabus.)

Recross Examination

Q. (By Mr. Nesbett): Mr. Harkabus, I believe you said the Defendant was arraigned in Seattle, did you? A. Yes.

The Court: No.

Q. (By Mr. Nesbett): Did you say that——

Mr. Nesbett: I understood him to say he was.

A. He was.

Q. (By Mr. Nesbett): Well, that is where I was confused. He was arraigned in Seattle?

A. He was arraigned in Seattle.

Q. And on what day?

A. I believe it was the 18th.

Q. Were you present at the time?

A. I was—I believe the Commissioner requested——

Q. Were you present when——

A. Yes, sir.

The Court: To refresh your recollection, Mr. Nesbett, the testimony was he was arraigned here in Anchorage, before Warren Colver.

Mr. Nesbett: On March 21st? [167]

The Court: Yes.

Mr. Plummer: There was also testimony, your Honor, that he was arraigned, by this witness, that he was arraigned in Seattle on the 19th.

The Court: I didn't hear it.

Mr. Nesbett: I believe I better clarify——

The Court: Well, the record will speak for itself. It was my recollection that he was——

Mr. Plummer: After arrival back to Anchor-

(Testimony of Edward J. Harkabus.)

age, but he was arraigned in Seattle. I believe the witness testified he was arraigned on the 19th of March in Seattle, prior to his departure from Seattle.

Q. (By Mr. Nesbett): Was that a Monday?

A. It was a Monday.

Q. That would be the 18th. Which Commissioner was he arraigned before?

A. John Burns, U. S. Commissioner in Seattle.

Q. John Burns? A. Yes, sir.

Q. You were present? A. Yes.

Q. Was the—was any charge read to the Defendant? A. Yes.

Q. What was the charge? [168]

A. Uttering a forged instrument, I believe.

Q. There was a Complaint then in existence at that time?

A. I believe there was, Mr. Nesbett.

Q. That Complaint was read, was it?

A. Yes, sir.

The Court: He was represented by an attorney at that time?

Q. (By Mr. Nesbett): Harris was there then, wasn't he? A. Yes, sir.

Q. And had extradition already been taken care of?

A. At that time, my recollection is that Mr. Smith's attorney, John Harris, made a motion to quash the waiver of extradition, executed by Mr. Smith.

Q. Was the motion argued?

(Testimony of Edward J. Harkabus.)

A. It was set for the 19th at 1:30 p.m.

Q. And when was the waiver of extradition signed? You were present when that was signed, weren't you?

A. No, sir.

Q. Weren't you?

A. No, sir.

Q. Well, did Pass and Trafton take care of that?

A. I assume that they did.

Q. That was done on a Saturday, wasn't it, the day you weren't there? [169]

A. Well, I don't know. I believe it was. Efforts were made to arraign him on that same date, according to Mr. Pass.

The Court: Now, what same date?

A. On the—it would have been on the 16th, your Honor.

The Court: I see.

A. I don't know that of my own knowledge. All I know is what I was informed.

Mr. Nesbett: That is what I was going to ask. I ask that it be stricken and your Honor disregard it. It's strictly hearsay. If Pass can take the stand and say that under oath, all right.

The Court: You asked the question, did you not?

Mr. Nesbett: No, I didn't; your Honor did.

The Court: Read the record back.

(Thereupon, the Court Reporter read back Line 24, Page 169 thru Line 7, Page 170, inclusive.)

The Court: The Court didn't ask the question, you see.

(Testimony of Edward J. Harkabus.)

Mr. Nesbett: Very well.

The Court: Let's take a recess. We have been in session well over an hour now. I would suggest, Mr. Johnson (the Court Bailiff), that you have the jurors come in and take their places in the courtroom. How long do counsel think this might go on?

Mr. Plummer: We have two short witnesses and one witness that will be fairly lengthy and not as lengthy as Mr. Harkabus, [170] however.

The Court: Well, now as to the fact that Mr. Pass and Lt. Trafton aren't here, won't counsel stipulate that they're not here and available?

Mr. Nesbett: Stipulate that they're not here?

The Court: Well, no, that they're not available.

Mr. Kay: I don't know that they're not available. The United States Attorney's office can subpoena a witness anywhere in the United States. I don't know whether they're inside the jurisdiction or not.

The Court: I don't know either, but I was hoping to conserve time on that basis. If you won't, of course, we will have to go along with it, but I assume that something of that nature you would know of your own knowledge and you'd be willing to stipulate to it.

Mr. Nesbett: I don't know, your Honor, and I am certainly not in a position to waive anything.

The Court: Very well, Court will go into recess for a period of ten minutes.

(Testimony of Edward J. Harkabus.)

(Thereupon, following a short recess, the following proceedings were had, out of the hearing of the jury and the spectators:)

The Court: Were you thru with this witness, Mr. Nesbett?

Mr. Nesbett: Yes, your Honor.

The Court: Very well. Mr. Kay? [171]

Recross Examination

Q. (By Mr. Kay): Just a few questions, your Honor. Mr. Harkabus, this proceeding in Seattle that occurred on Monday there, are you sure that was an arraignment or is it possible that it was a hearing on this question of extradition or something? A. It was an arraignment.

Q. Do you recall if the bond was set?

A. It was \$10,000.00, at my recollection.

Q. Was there a Complaint there present in Seattle that was read at that arraignment?

A. I believe there was, Mr. Kay.

Q. Were you present throughout the proceeding?

A. I was in the back portion of the Commissioner's Court. They indicated that they wanted us up there and I didn't know exactly— (pause)

The Court: You may continue, Mr. Kay.

Q. (By Mr. Kay): You are, of course, aware of the difference between an arraignment and a— or, know what an arraignment is, do you not, Mr. Harkabus? A. Yes, I do. [172]

Q. From where you were standing in the court-

(Testimony of Edward J. Harkabus.)

room, could you hear everything that went on in regard to the proceedings?

A. I believe I could hear it.

Q. Can you recall what went on?

A. It was an arraignment; that is my recollection and the bond was set and the Defendant was informed of his rights and so forth. He was represented by an attorney at that time, Mr. Kay.

Q. And that attorney immediately raised the question, did he not, of extradition, and made this motion to quash the waiver of extradition that had previously been signed? A. He did.

Q. And a date was set the following day or two days later for a hearing on that motion?

A. It would have been the 19th which was the subsequent date at 1:30 p.m.

Q. And then it's your testimony that the Defendant was again arraigned here in Anchorage?

A. Well, that—I think that your best record would be your Commissioner of Court records.

Q. You don't know of your own knowledge whether he was arraigned again?

A. I'd been informed that he was, yes, sir.

Q. But of your own knowledge?

A. No, sir. [173]

Q. Then you wouldn't be aware of any reason why he would be arraigned twice, if he was in fact arraigned twice? A. No.

Q. Where did this proceeding take place? Was it in the same building as the jail?

A. No, sir.

(Testimony of Edward J. Harkabus.)

Mr. Kay: That is all the question I have.

The Court: Mr. Plummer, any redirect?

Mr. Plummer: No, your Honor.

The Court: Mr. Hepp?

Mr. Hepp: No questions.

The Court: Very well, then, you may step down, Mr. Harkabus. You may call the next witness.

Mr. Plummer: I would ask that the Court take judicial notice of its own files and see that on the Held To Answer papers that a Complaint was filed against this Defendant on March 14, 1957 and that the warrants did issue on that date.

The Court: Very well, motion is granted.

Mr. Kay: Just to satisfy my curiosity, would the court file there also reveal the date of an arraignment here in Anchorage, Alaska?

Mr. Plummer: It does reveal.

The Court: You say "it does"?

Mr. Plummer: It does. The Held To Answer transcript that came up revealed what day he was arraigned and by whom. The [174] reason I am sure is because I looked at the Commissioner's copies over the noon hour.

The Court: Mr. Kay, I point out to you that there is a Complaint signed the 14th day of March, 1957 by William T. Plummer and also by Warren C. Colver, Deputy United States Attorney (meaning Deputy United States Commissioner) in the file and bond set at \$10,000.00 on that date, and also——

Mr. Kay: That is a bond endorsed on the Complaint, is it?

The Court: That is correct. Then the commitment pending trial is signed on the 21st day of March; bail fixed at \$10,000.00.

Mr. Kay: Does the transcript here in this file show anything of the arraignment in Seattle?

The Court: Could you help me, Mr. Plummer?

Mr. Plummer: The transcript I saw down in the Commissioner's Court over the noon hour did not mention any arraignment in Seattle.

Mr. Kay: That is all.

The Court: Very well. You may call your next witness.

Mr. Plummer: I'd ask that Jim Barkley be called.

The Court: For the record of counsel it shows that a warrant for Charles Edward Smith was issued the 14th day of March, 1957, and he was arrested at Seattle, Washington on March 15, 1957. That may help you. You may proceed counsel. [175]

JAMES H. BARKLEY

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

Q. (By Mr. Plummer): Would you please state your name, sir? A. James H. Barkley.

Q. Your occupation?

A. Territorial Police Officer.

Q. And where are you stationed, sir?

A. Fairbanks, Alaska.

(Testimony of James H. Barkley.)

Q. Do you know a Lt. Trafton in Fairbanks, Alaska? A. Yes, sir.

Q. And do you know—what is his occupation?

A. He is my commanding officer in Fairbanks detachment.

Q. Do you know where he is at this time?

A. Japan.

Mr. Plummer: I have no further questions.

The Court: You may cross examine.

Cross Examination

Q. (By Mr. Kay): Is he on vacation? [176]

A. Yes, sir.

Q. When did he go?

A. I don't know the exact date. It's been approximately two or three weeks.

Q. You don't actually know, personally, that he is in Japan? I mean, you haven't seen him there? A. No.

Q. You just know he is supposed to be in Japan?

A. That is correct, sir.

The Court: Any other cross?

Q. (By Mr. Nesbett): Is he still employed by the Territorial Police? A. Yes, sir.

Q. Is he coming back to work in Fairbanks, or— A. As far as I know, sir, yes.

Q. Have any charges been placed against him, to your knowledge, within the department?

A. Not to my knowledge, no, sir.

Q. Is he in command of the whole unit in Fairbanks? A. Yes, sir.

(Testimony of James H. Barkley.)

Q. When is he expected back?

A. I don't know for sure what the length of his annual leave. I have heard it's the middle of April.

Q. How much annual leave do you officers ordinarily get with the department, Officer Barkley?

A. It varies; there's nothing—there's no set——

Q. Do you have thirty days of vacation a year or——

A. A year, yes, sir, thirty days annual leave per year.

Q. Has he been—did he leave the department three weeks ago, or, did you say he was in Japan two or three weeks ago the last you heard?

A. Left on his vacation.

Q. Two or three weeks ago? A. Yes, sir.

Q. And he will be back maybe in the middle of April?

A. To the best of my knowledge, yes, sir.

Q. What is his rank? A. Lieutenant.

Mr. Nesbett: I believe that is all.

The Court: Any redirect?

Mr. Plummer: No, your Honor. I will advise the Court that I may call this witness on rebuttal. Of course, there is no way to anticipate, so I will ask that he be out of the courtroom.

The Court: Very well. You may be excused then.

Mr. Plummer: Will you call Mr. Hibpshman?

EARL W. HIBPSHMAN

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follow on [178]

Direct Examination

The Court: You may proceed, counsel.

Q. (By Mr. Plummer): Will you please state your name, sir? A. Earl W. Hibpshman.

Q. Occupation? A. Police Officer.

Q. With the Anchorage City Police?

A. Yes, sir.

Q. What division? A. Detective Division.

Q. Do you know, sir, a Mr. Ted Pass?

A. Yes, sir.

Q. Is he still with the Anchorage Police Department? A. No, sir, he is not.

Q. Do you know about when he severed relations with the Police Department?

A. Yes, sir, October 31, 1957.

Q. Do you know his present whereabouts?

A. I believe he is someplace in North Carolina; I am not sure of the town, no, sir.

Mr. Plummer: I have no further questions.

The Court: You may cross examine. [179]

Cross Examination

Q. (By Mr. Nesbett): When did you last hear of Mr. Pass?

A. Sir, I have not heard of Mr. Pass since three or four days before his dismissal.

Q. How did you happen to know that he is in North Carolina?

(Testimony of Earl W. Hibpshman.)

A. Only by being told; I have seen no correspondence, sir.

Q. Is he confined in a mental institution there in North Carolina?

A. No, sir, that I know of.

Q. Has he been confined in any mental institution since he left the force, to your knowledge?

A. No, sir, not that I know of.

Q. Have you understood or heard that he has been?

A. No, sir.

Q. Do you know why he left the force?

A. Yes, sir.

The Court: Well, that is irrelevant and immaterial. He is not on trial.

Mr. Nesbett: Very well, your Honor.

The Court: Any other cross? You may step down then.

Mr. Plummer: No further questions.

The Court: You may call your next witness.

Mr. Plummer: Call James E. Chenoweth. Just open the door. He is down the Marshal's Office.

JAMES H. CHENOWETH

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

Q. (By Mr. Plummer): Will you please state your name, sir?

A. James H. Chenoweth.

Q. Occupation?

A. Chief Deputy United States Marshal.

(Testimony of James H. Chenoweth.)

Q. I call your attention to, sir, to Criminal No. 3772, entitled United States vs. James Ing and others, and ask you, if you know, if a subpoena was issued for one Ted Pass, formerly with the City Police in regard to this cause?

A. Yes, sir, it was.

Q. And do you know, or, if you know, will you tell us where this subpoena was sent and where it was served, if in fact it was served?

A. We sent the subpoena to the United States Marshal at Raleigh, North Carolina for service upon Mr. Pass at Rocky Mountain, North Carolina.

Mr. Plummer: May I approach the witness, your Honor?

The Court: You may.

(Thereupon, Mr. Plummer approached the witness.)

Q. (By Mr. Plummer): I ask you, sir, if you know whether or not the subpoena was [181] served?

A. The Deputy Marshal at—in the area close to Rocky Mountain, North Carolina went out to serve the subpoena on Mr. Pass. He did not serve it because Mr. Pass is under doctor's care at the present time. He wired the information to us and asked for instructions on the service of the subpoena, advising us in the same telegram that a physician's certificate would be forthcoming.

Q. Is that the telegram that you have there in front of you?

A. Yes, sir, it is.

(Testimony of James H. Chenoweth.)

Q. Unless the Court or counsel want to look at it, or——

Mr. Kay: I'd like to inspect; I am not insisting that—but I would like to examine it.

(Thereupon, the document was inspected by Mr. Kay.)

Q. (By Mr. Plummer): And did you in fact receive such a certificate from the doctor?

A. Yes, we did.

Q. May I once again approach the witness?

The Court: You may do so.

(Thereupon, Mr. Plummer approached the witness.)

Q. (By Mr. Plummer): I ask you, sir, if you can tell me what that is?

A. This is a letter from Dr. Stone which was sent to the United States Marshal at Raleigh, North Carolina, and he in turn [182] forwarded it to us. This is the doctor that has Mr. Pass under his care.

Q. And would you tell us what in effect the letter says?

A. The letter says that Mr. Pass had been under the doctor's care for a period of approximately two weeks; that he had had during that period of time two severe convulsions at home; that he was presently being treated by that doctor with Thora-zine and Dilatin sodium in order to control these seizures and the doctor stated, in his opinion, it would be inadvisable for the witness to undertake a trip to Alaska, at this time.

(Testimony of James H. Chenoweth.)

Mr. Plummer: I don't intend to offer this. I will show it to counsel. If they want me to, I will make such an offer.

The Court: Very well. Any cross examination?

Mr. Nesbett: No questions.

Mr. Kay: No questions.

The Court: Very well. You may step down.

Mr. Plummer: May I give these to Mr. Chenoweth to return to his file?

The Court: They will be available in the event counsel needed them.

Mr. Kay: I wonder if I could just ask Mr. Chenoweth a question as he stands there? [183]

Cross Examination

Q. (By Mr. Kay): Have you been asked to serve a subpoena on Lt. William Trafton?

A. Yes, sir.

Q. Did you make any effort to do so?

A. Yes, sir. Lt. Trafton is either somewhere in Hawaii, Tokyo, or East. He's been on vacation, or, he's taking annual leave for a period of about five weeks and nobody knows exactly where he is.

Q. When were you asked?

A. I'd have to check the records. It was sometime during the normal course of the issuance of subpoenas in this case.

Q. What's that, a week, two weeks, ago?

A. I'd say approximately two weeks ago, anyway, if my memory serves me correctly.

The Court: Any redirect, counsel?

Mr. Plummer: No, your Honor.

The Court: Thanks, Mr. Chenoweth. You may be excused. You may call your next witness.

Mr. Plummer: I'd like to call Stanley Laird.

STANLEY H. LAIRD [184]

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

The Court: You may proceed.

Mr. Nesbett: Your Honor, before he commences to question Officer Laird, I object to any of the testimony; Officer Laird has sat here all through the trial and I don't think it's proper. I don't know what phase of the case or statement he intends to question him on, but I don't think it's proper.

The Court: Objection overruled. He may proceed.

Q. (By Mr. Plummer): Will you please state your name, sir? A. Stanley H. Laird.

Q. Your occupation?

A. Territorial Police Officer.

Q. And you, in behalf of your department, worked this case for the Department of the Territorial Police, is that correct, sir? A. I did.

Q. And I ask you, sir, if you recall right before the noon recess today extracting a copy of a statement allegedly taken from Charles Edward Smith from your file and handing it to defense counsel?

A. I did.

(Testimony of Stanley H. Laird.)

Mr. Plummer: And, may I approach the witness, your [185] Honor?

The Court: You may do so.

(Thereupon, Mr. Plummer approached the witness.)

Q. (By Mr. Plummer): Is this a copy of the statement that you gave him at that time?

A. It is.

Q. I see what appears to be a longhand notation up in the upper lefthand corner of the statement saying "3/16/57". Do you see that?

A. Yes, sir.

Q. Do you know who put that on the original, which is not available now, or on the copy that you gave them?

A. I put it on myself. It was for filing purposes. That was the weekend or so of Pass going to Seattle to locate Mr. Smith.

Q. You had no knowledge of when the statements were actually taken? A. No, sir.

Q. The "3/16/57" did not refer to that in any way? A. No, sir.

Q. Do you know the Defendant in this case, Charles E. Smith? A. Yes, sir.

Q. Did you have occasion, sir, to see him on or about March 27, 1957? [186] A. I did.

Q. And where did you see him, sir? (pause) Where did you see him, sir?

A. I saw him at the Federal Jail. We picked him up, Detective Pass and myself, between 10:20 and 10:30 a.m. of that date.

(Testimony of Stanley H. Laird.)

Q. And what, if anything, did the three of you do?

A. We took Mr. Smith with us and, to substantiate his statement, took him about Anchorage and had him point out the various stores and, where he had left off Mr. Volk, and just going over the points of his statement.

The Court: Counsel, that doesn't have anything to do with the admissibility of this statement, though.

Mr. Plummer: Subsequent to the two arraignments, after; he certainly had been advised of his rights. He now says that the statement is true and it was voluntarily given, if in fact I can elicit from this witness that he did so testify.

The Court: Excepting this, that is not relative to the admissibility of this statement itself. That is the only thing we are trying. It might be to the trial itself, but not to the statement.

Mr. Plummer: My point, your Honor, was, and I probably expressed it very poorly, if sometime after he had been advised of his rights, if he in front of this witness said that the statement was true, (1); and that it was given voluntarily with no threats or promises made to him. That certainly, that would tend [187] to show that at the time the statement was given that condition also existed.

The Court: Well, I anticipate, maybe not rightly, counsel for the defense are going to raise objection

(Testimony of Stanley H. Laird.)

that the statement is inadmissible because he was not timely arraigned; so, therefore, that would have no bearing upon—and I haven't talked to counsel about it. It's just obvious from the testimony, so, whether it was voluntarily, involuntarily, accurate, or inaccurate is unimportant at this point.

Mr. Plummer: Very good, sir. Then, I will probably at this time not waste further time of the court with this witness. I am trying to figure out how I can renew my motion without Mr.—for submission—without Mr. Harkabus being here.

The Court: Well, of course, you could do that without—he's properly identified it now.

Mr. Plummer: All right, I ask that Mr. Laird be excused for the time being then.

The Court: Is there any cross, counsel?

Mr. Nesbett: I was going to ask Mr. Laird a question or two.

The Court: I thought maybe you had——

Mr. Nesbett: As long as it was touched on. [188]

Cross Examination

Q. (By Mr. Nesbett): How, in the course of your filing procedure, Sergeant, would you get—would you have occasion to mark on a report of that nature "3/16/57", such as you mentioned?

A. That was from Ted, sir, Ted Pass' reports and so on and compiling them in the folder is just to get continuity of papers, that's all, just the weekends and so on. I don't know the exact date the statement was taken. In other words——

(Testimony of Stanley H. Laird.)

Q. That is what puzzles me. You couldn't have received it before, say, the 20th, or 21st, could you?

A. No, sir, and the papers were not always—they were held in abeyance and were not—in other words—put in to the folder until we were ready to get the thing in——

Q. Did Officer Pass bring it up to you or did he mail it to you?

A. He gave it to me about a week or so after he returned.

Q. Now, that is the point, Sergeant: how then, a week later, did you happen to write "3/16/57" on that statement?

A. I was just going by his daily report.

Q. Did you read a daily report? Did something in the report give you the idea that it was taken on the 16th?

A. It was just the period of time, sir, just the period of time that he had gone down to Seattle to contact Mr. Smith, or, arrest Mr. Smith. [189]

Q. Well, after you did write "3/16/57" on the statement then, where in your filing cabinets would you put it in order to be able to go back to it with respect to that date?

A. It's in my folder during the month or the week of—everything is listed in dates and by date and it was just as a figure of speech. I just took an arbitrary figure and, assuming it was on or about the 16th. I didn't know.

Q. Didn't you take the figure, though, that rep-

(Testimony of Stanley H. Laird.)

resents the date from Lt. Pass'—from whose records? Traftons?

A. Lt.—or, it was Detective Pass'.

Q. Detective Pass' records; something you saw in his records made you write "3/16/57", wasn't there?

A. I was just assuming, sir; I was just assuming; I didn't ask him. I was filing the papers and getting them in continuity. That was all. The figure didn't mean anything at all.

Q. You have trouble going back and finding your files? A. No, sir.

Mr. Nesbett: That is all.

Mr. Plummer: I have no further questions.

The Court: You may step down. Now, you may call your next——

Mr. Plummer: I, at this time, offer what has been marked for identification, only, as Plaintiff's Exhibit No. 20 into evidence. [190]

The Court: Is there objection?

Mr. Kay: Yes.

Mr. Nesbett: Yes, your Honor, there is objection and I, of course, want to call the Defendant as a witness with respect to the statement.

The Court: Very well, you may come forward, Mr. Smith and take the stand.

CHARLES E. SMITH

called as a witness for and on behalf of the Defendant, and being the Defendant, and being first duly sworn, testifies as follows on

Direct Examination

Mr. Nesbett: As I stated, your Honor, Mr. Smith is being called simply for the purpose of determining the admissibility of this statement and no others.

The Court: That is in conformance with the practice. You may proceed.

Q. (By Mr. Nesbett): Your name is Charles E. Smith, and you are a Defendant in this case, are you not? A. That is right.

Q. And you sat in court here throughout the trial? A. Yes.

Q. Now, were you in Seattle on about March 15, 1957? [191] A. Yes, I was.

Q. Were you arrested on that date?

A. Yes.

Q. Now, will you—about what time of day were you arrested and where were you when it occurred?

A. I was at my folks' house. It's 115 — no; 11815, 78th South, and I would say it was around 3:00 o'clock.

Q. In the afternoon? A. Yes.

Q. Do you recall what day it was?

A. I believe it was a Friday.

Q. Now, state what happened at the place at that time?

A. I was just talking to someone on the phone and there was a knock on the door and my mother

(Testimony of Charles E. Smith.)

answered the door and somebody asked if I was there and she said "no", so they just pushed her aside and came in the house.

Q. Did you know who that was?

A. I learned later it was the sheriff of Seattle.

Q. And did you learn later that his name was Wayland, or Weeland? A. Yes, I did.

Q. Who else was with him?

A. I believe Detective Pass was, or, Marshal Pass.

Q. Do you recall any other persons who were with him? A. No.

Q. Did you see Lt. Trafton? [192]

A. Yes, I did.

Q. Well, was he with the sheriff?

A. Well, they was all together, but the only two to come inside the door was Mr. Pass and that sheriff.

Q. Now, where were you in the house at the time they came in?

A. I was right by the phone.

Q. Did either of those persons make any statement to you when they came thru, past your mother?

A. The sheriff said that I was under arrest.

Q. Did he tell you why you were under arrest or for what? A. No, he didn't.

Q. Did the sheriff show you a warrant?

A. He didn't show me nothing.

Q. Did you—were you ever presented with a warrant? A. No, I wasn't.

(Testimony of Charles E. Smith.)

Q. What happened then?

A. Well, they took me down to Seattle Federal Jail there.

Q. I'll ask you this, before you go on with the story: did you see Mr. Harkabus there at that time?

A. Yes, I did.

Q. Where was Mr. Harkabus?

A. He was with them.

Q. Did he come in the house?

A. Not in the house.

Q. Did he stay outside the house? [193]

A. Yes, sir.

Q. Do you remember which door they came in?

A. They came in the back door.

Q. Was Mr. Harkabus near the back door, or do you know, when they went out?

A. When I come out, they was all right together there, real close.

Q. All right. Where were you taken?

A. Seattle Federal Jail.

Q. Would that be the King County Jail there?

A. I believe it would be.

Q. What was done with you there?

A. Well, I went in this sheriff's office there and Pass and I believe Harkabus and that sheriff was there.

Q. Was Lt. Trafton there?

A. Yes, Lt. Trafton, too.

Q. Are you sure Harkabus was there?

A. He was there right from the beginning.

Q. All right. What happened in this office?

(Testimony of Charles E. Smith.)

A. Well, he started asking me questions about this M-K check deal.

Q. And did you give him any answers to those questions? A. No, I didn't.

Q. How long were you in that office?

A. I'd say around three hours. [194]

Q. And was Harkabus there during that period of time?

A. He was there right at the start.

Q. And how long did he remain there, if you recall? A. Not too long.

Q. Did the others, any of the others, remain after Mr. Harkabus left?

A. Mr. Pass did and Mr. Trafton.

Q. Mr. Pass and Mr. Trafton remained?

A. Yes.

Q. During the entire three hours you say you were there? A. Yes.

Q. What was being said and done in the office during those three hours?

A. They wanted me to sign, I don't know what they call it, but something saying they could take me back up to Alaska.

Q. Well, would it be something to do with extradition? A. Yes.

Q. Does that sound familiar? A. Yes.

Q. Did you sign it?

A. Well, not at first, but——

Q. Did you eventually sign it?

A. I did; right at the end I signed it.

Q. Now, did Mr. Pass or Mr. Trafton or Mr.

(Testimony of Charles E. Smith.)

Harkabus ever talk to you about your right to have an attorney or, in fact, did [195] anything—that anything you said might be used against you?

A. No, they didn't.

Q. During that entire session?

A. No, they didn't.

Q. Are you positive of that?

A. I'm positive.

Q. Did they ask you to sign any written statements other than this extradition paper at that time?

A. No, they didn't.

Q. Did you, during the course of that interview, at the end of that three hours, make any admissions of your connection with the M-K matter?

A. No, I didn't.

Q. Where did you sign this paper in connection with extradition?

A. That was in the sheriff's office.

Q. Was that on the same day you were brought in?

A. Same evening, yes.

Q. About what time in the evening did you sign it?

A. That must have been around 6:00—6:30.

Q. Did you know what you were doing when you signed that paper? Did you know the effect of it?

A. All I know I wasn't going to get no sleep until I signed it, I guess, so I signed it.

The Court: Just answer the question now. [196]

Q. (By Mr. Nesbett): Well, did you know the

(Testimony of Charles E. Smith.)

effect, what they expected to accomplish by getting your signature on that paper?

A. No, I didn't.

Q. Did you — did they mention something about bringing you back to Alaska in connection with the paper?

A. I believe Detective Pass said he was going to bring me back to Alaska.

Q. Did you know that signing that paper would permit him to bring you back without legal proceedings?

A. I didn't then.

Q. You found that out later, did you?

A. Yes.

Q. Now, what—after you signed the paper, what was—what happened to you?

A. They took me back to my cell.

Q. And were you in a cell with other prisoners or alone?

A. I was alone.

Q. And how long were you in the cell there?

A. Well, that night—all that night and next day; I'd say about four days, I guess, altogether, four or five days.

Q. Well, you went in on a Friday, didn't you?

A. Yes.

Q. Were you in a cell all day Saturday the following day?

A. Yes.

Q. And were you taken out at all during that day? [197]

A. Detective Pass and Mr. Trafton, they come and talked to me.

Q. Where did they talk to you?

(Testimony of Charles E. Smith.)

A. There's a little room up there from the cell where, I don't know what they call it, something like an anteroom; everybody talks there.

Q. About what time of the day did they come to talk to you? A. About around noon.

Q. How long did that talk last?

A. About an hour.

Q. What was the nature of that talk?

A. They was asking me a bunch of questions about this M-K checks.

Q. Did you at that time make any admissions or statements that would connect you with this M-K matter? A. No, I didn't.

Q. What happened to you after that interview came to an end?

A. They took me back to the cell.

Q. How long did you remain in the cell then?

A. Until Sunday.

Q. Until Sunday, and about what time Sunday? A. I'd say around 12:30.

Q. Were you taken out at that time on that date? A. Yes, I was.

Q. Where were you taken?

A. I was taken back to that room again, the anteroom. [198]

Q. Did you see any people in that room?

A. There was Mr. Harkabus and William Traf-ton and Detective Pass.

Q. What happened in that room then?

(Testimony of Charles E. Smith.)

A. Well, Mr. Pass told me that I better make a statement.

Q. Well, is that all he said?

A. Well, he told me—he just told me.

Q. What was his attitude when he told you that you better make a statement?

Mr. Plummer: I object to what his attitude was.

The Court: Objection sustained. This is on direct examination.

Q. (By Mr. Nesbett): What was the occasion for Detective Pass telling you that you better make a statement? What were the circumstances under which he made the statement?

A. He told me that—when I first went in there, he told me I better make a statement so he'd get back up North and wouldn't be down there too long.

Q. Well, did you make a statement right then?

A. No, I didn't.

Q. Was Harkabus taking any part in this conversation? A. Yes, he was.

Q. Was Lt. Trafton taking any part?

A. Very little. [199]

Q. Now, how long were you in the room with those people? (pause) Approximately, on that date?

A. I'd say around three hours.

Q. Around how long? A. Three hours.

Q. During the course of the time you were in that room, did any attorney attempt to visit with you? A. Yes, he did.

Q. About how long after you had been in the room did this happen?

(Testimony of Charles E. Smith.)

A. I'd say around two and a half hours.

Q. And how did you learn that an attorney was attempting to see you?

A. Well, the jailer there, he came in the room there and said there was an attorney out there to see me.

Q. And did you or any one in connection with this interrogation make any remark?

A. Mr. Harkabus, he said that he could see me when he got done with me.

Q. Do you know who Mr. Harkabus was talking to when he said that? A. The jailer.

Q. Did the jailer make any remark to Mr. Harkabus? A. Not at that time, he left.

Q. Did you learn that the attorney made later attempts to see [200] you?

A. The jailer come in again, oh, I'd say around fifteen minutes.

Q. And what did the jailer say on that occasion?

A. He said that I had a right to see an attorney and an attorney was wanting to see me.

Q. Did Mr. Harkabus, Lt. Trafton or Detective Pass make any remarks at that time?

A. Mr. Harkabus he said they was about done, that he'd see me in a few minutes.

Q. Did the jailer make any statement at that time? A. He left him in.

Q. Now, did the jailer make any other remarks in connection with you in seeing your attorney?

A. He did say that I had a right to see him, or

(Testimony of Charles E. Smith.)

that he said—he was talking to Mr. Harkabus when he said this, he said “he has a right to see his attorney”; that’s all he said.

Q. Who said that? A. The jailer.

Q. Was he talking to Mr. Harkabus?

A. He said it at Mr. Harkabus.

Q. Was that before or after Mr. Harkabus said “the attorney can see him when we get thru with him”? A. That was afterwards.

Q. Now, did you in fact see your attorney there after?

A. Oh, about ten minutes later, he was standing right in the [201] doorway there.

Q. Now, during this ten-minute interval, the attorney appeared before—the attorney appeared. Did Detective Pass go out for purposes of talking to the attorney to your knowledge?

A. Not to my knowledge.

Q. Do you know who brought the attorney to the door when you saw him?

A. I know that he was with the jailer; that is the only one I know that he was with.

Q. Did he come inside the room very far?

A. No, just to the doorway.

Q. And did the attorney make any remark when he came to the door?

A. He asked me if there was anything that I wanted to see him about.

Q. Did the jailer make any remark prior to the attorney’s statement? Did the jailer announce the attorney or did he——

(Testimony of Charles E. Smith.)

A. Oh, yes, he—when he come up there, he said, “this is Mr. Harris” and my dad had sent him down for me.

Q. Did Mr. Harkabus, or Mr. Pass, or Mr. Trafton make any statement in response to the statement of the jailer? A. None then.

Q. Were you all sitting down?

A. All but Mr. Trafton; I believe he was standing. [202]

Q. Did any of those three people you were with in the room make any statement when the jailer said, “here’s the attorney that your father sent down”? A. No, they didn’t.

Q. The attorney then made the statement to you that, was there anything he could do for you, is that right? A. Yes.

Q. Did you—were you still at the table or sitting down, rather? A. Yes.

Q. Were you sitting at the table with Harkabus as he testified? A. Yes, I was.

Q. Did—what did you say, if anything, to the attorney then?

A. I said, “no, there wasn’t”.

Q. Did you want to see your attorney, or the attorney at that time?

A. Well, I didn’t want to cause no trouble so I just—they was just about overwith, so I said, “no”.

Q. How long had you been in the room at that time?

The Court: It’s already been testified to, counsel.

(Testimony of Charles E. Smith.)

Mr. Nesbett: Was it two and a half hours, your Honor?

The Court: Yes.

Q. (By Mr. Nesbett: And how long had it been since your attorney had been announced? [203]

A. I would say mighty close to a half hour.

Q. Why didn't you or, rather, I'll ask you this: did Harkabus or any of them say, "well, you can go out and talk to your attorney if you want to"?

A. No, they didn't.

Q. Did anyone tell you that you had a right to confer with that attorney in private?

A. No, they didn't.

Q. Had you signed anything up to that time?

A. No, I hadn't.

Q. Were you ready to sign anything?

A. Yes, I was.

Q. Now, Mr. Smith, did you in fact sign something that day? A. Yes, I did.

Q. Do you know what you signed? What was it?

A. I signed a statement written up by Mr. Harkabus.

Q. How was it written up, if you recall?

A. It was just written on plain paper.

Q. Was it written—typewritten or longhand?

A. It was just written in longhand.

Q. How long after your attorney, the attorney left did you sign this statement, approximately?

A. Right away.

Q. Was the statement already written up at that time then? A. Yes. [204]

(Testimony of Charles E. Smith.)

Q. Had Mr. Harkabus been writing then on the statement during this entire interview?

A. Yes, he wrote it all.

Q. Do you recall what was at the top of that statement?

A. Well, I thought it said that "this statement will not be used against you".

Q. Was that, to your recollection, was that statement written in handwriting on the top of the statement?

A. Yes, it was.

Q. Had Harkabus been questioning you in connection with some fire loss in addition to the M-K matter?

A. Yes, he was.

Q. Was any typewritten statement given to you on that day to sign?

A. There was a little later.

Q. I see. Was that the statement that has been presented to the Court here?

A. Yes.

Q. Where did you sign that statement, if you recall?

A. They brought me out of my cell and back in that room again.

Q. And about how long after the afternoon was it when your attorney called, was it, that they brought this other statement to you?

A. Oh, around an hour.

Q. Are you positive you had previously, however, signed the [205] handwritten statement of Harkabus?

A. Yes.

Q. Did you—were you told by Harkabus or any of them that you needn't make any statement if

(Testimony of Charles E. Smith.)

you didn't want to? A. No, I wasn't.

Q. Were you told by them that prior to the commencement of the Sunday meeting that you were entitled to an attorney and needn't make any statement? A. No, I wasn't.

Q. Why didn't you get up and demand to see your attorney at the time he stood in the door there and asked you if he could do anything for you?

A. Well, I already—the statement was just made out, you know, and everything was done but it was just signed and I didn't want to cause any trouble; it was just about over with.

Q. Did Detective Pass make any statement to you in connection with what might happen to you if you went ahead and signed the statement and cooperated?

A. He told me if I would cooperate that he would see that it was known up here.

The Court: Mr. Nesbett, please don't lead the witness now; even if the Government doesn't object I will have to. I want to do the best I can for this Defendant, but I don't want you to ask leading questions to determine that. Let this witness [206] testify what is determined, please.

Q. (By Mr. Nesbett): Mr. Smith, about what time of the day then was it that you signed this typewritten statement?

A. I would say around five, something like that; maybe five-thirty. It would be hard to say.

Q. That was on a Sunday, was it?

A. Yes, it was.

(Testimony of Charles E. Smith.)

Q. What was then done with you?

A. After I signed?

Q. Yes.

A. I was taken back to my cell again.

Q. How long did you remain in the cell?

A. Well, until they called me up for, some place, to see about some extradition.

Q. Do you know where you were called and on what day it was that you were called?

A. No, I don't.

Q. Well, what happened when you were called up this next time in connection with extradition?

A. Well, there was a room full of people there and Mr. Harris was there.

Q. Who is Harris? Was he the attorney?

A. My father got, yes, sir.

Q. What happened in that room full of people?

A. I guess they was talking about extradition because they never did ask me nothing. I just——

Q. Were any statements made to you in that room by anyone? A. Not to my knowledge.

Q. Was there a judge, someone sitting there, an authority? A. Yes, there was.

Q. At a desk? A. Yes, there was.

Q. Did that person make any statement to you during that hearing? A. Not to me.

Q. Did that person make any statement in connection with any charge against you?

A. No, he didn't.

Q. Well, what was the nature of the hearing?

A. I believe it was extradition.

(Testimony of Charles E. Smith.)

Q. What did Harris do there for you? Why was he there, do you know?

A. Well, he was talking about something that they arrested me wrong or something like that, and they didn't give me no counsel or nothing like that. He was going to fight extradition.

Q. How long were you in the room?

A. Oh, about half an hour.

Q. Were you, during that time you were in that room, advised that—was a Complaint read to you charging you of having to do with [208] these checks, forging them? A. No, there wasn't.

Q. Did you sign anything in your room?

A. No, I didn't.

Q. What next happened to you?

A. Well, they took me back to my cell again.

Q. And how long were you in the cell that time?

A. Oh, I believe a day or—either one day or two days.

Q. Then what happened to you?

A. We got on a plane and came to Anchorage.

Q. Where did you go in Anchorage?

A. They took me down to Federal Jail.

Q. When did you see anyone or have occasion to leave the Federal Jail after you had arrived?

A. Mr. Pass come and got me.

A. And when, with respect to the time of your arrival?

A. Oh, about two days, I believe, something like that.

Q. Were you ever taken before a U. S. Commis-

(Testimony of Charles E. Smith.)

sioner here? A. Yes, I was.

Q. Were you informed of the charge or complaint read to you? A. Yes, I was.

Q. And where you advised of your rights on that occasion? A. Yes, I was.

Q. Were you asked about preliminary hearing?

A. He just asked me if I wanted to waive it.

Q. What did you say?

A. I signed the slip and signed "yes".

Q. How long were you in the Federal Jail here before you were released on bail?

A. I'd say around ten days; I don't really know.

Q. Were you in jail during the time that these witnesses have testified that you rode around town with them, identifying the places that you——

A. Yes, I was.

Q. Have you read this typewritten statement that has been offered in evidence? A. Yes.

Q. You did read it, didn't you? A. Yes.

Q. Do you recall ever having read that full statement ever before?

A. The front first paragraph there is a little mixed up to my notion.

Q. Is that your signature on the pages?

A. Yes, sir.

Q. When they took you out of your cell the second time on Sunday to look at that statement, I will ask you did you read that statement over in full before you signed it?

A. I probably just glanced thru it and just signed it to be done with it; that's all. [210]

(Testimony of Charles E. Smith.)

Mr. Nesbett: I believe that is all, your Honor.

The Court: Very well. You may cross examine, Mr. Plummer.

Cross Examination

Q. (By Mr. Plummer): Mr. Smith, was—did you testify in response to a question of Mr. Nesbett's, that the only way you would ever get any sleep was to sign a waiver of extradition?

A. Yes, I did.

Q. And what time was it of the day that you signed it? A. I'd say around six.

Q. Six in the afternoon?

A. Six in the evening, yes.

Q. Do you usually go to bed before that time, do you? A. No.

Q. Now, did your attorney, that is, Mr. Harris, when he came to your cell there, did he—did you make any request to talk to him alone?

A. No, I didn't.

Q. Did he advise you that you could talk to him alone? A. No, he didn't.

Q. Did anybody prevent you from making such a request? [211] A. No, they didn't.

Q. Were you frightened in front of detective Pass and these people to request that?

A. Well, it was all done; there was so much argument before that I thought, well, I better just do it and be done with it.

Q. Had they made any threats to you of any kind? A. No.

Q. May I have Plaintiff's Exhibit No. 20? May

(Testimony of Charles E. Smith.)

I approach the witness, your Honor?

The Court: You may.

(Thereupon, the exhibit was handed to Mr.

Plummer and he then approached the witness.)

Q. (By Mr. Plummer): I wonder, Mr. Smith, is that your signature there? A. Yes, it is.

The Court: He so admitted that, counsel, if you so recall.

Q. (By Mr. Plummer): I wonder if you'd just read that first paragraph.

A. (Reading): "I, Charles Edward Smith, residing at 11815 - 78th Avenue, South, Seattle, Washington, hereby make the voluntary signed statement to Special Deputy, United States Marshal Ted Pass, and Lt. William W. Trafton, Dept. of Territorial Police. I have been advised of my right to counsel, that I need not make a statement and any statement that I do make may be [212] used against me in a court of law. No threats or promises, or any form of duress have been used to induce me to make this statement."

Q. Fine. Now, that as a matter of fact, you just said were your rights explained to you?

A. They never explained nothing to me. The first ones I signed there was four papers written up in his own handwriting.

Q. Well, you signed this, though, didn't you?

A. Yes, he brought this later.

Q. Well, did you—had anybody explained your rights to you?

A. No, they didn't, not at that time.

(Testimony of Charles E. Smith.)

Q. Well, had they ever? You said in your statement that they did. Had they?

A. It says in this statement at the top of it, yes.

Q. Well, had they?

A. No, they hadn't.

Q. Well, now, your attorney had been there. Did you tell him that nobody had explained your rights to you?

A. He never said too much to me because he was arguing with Mr. Harkabus and Ted Pass for keeping him out.

Q. Well, you testified that he was in there, didn't you?

A. Yes, I did. He came in on his own.

Q. Did you ask him what your rights were, or tell him that your rights had not been explained to you? A. No, I didn't. [213]

Q. And you didn't ask for a private appointment with him or anything like that?

A. No, I didn't.

Q. Well, if you were concerned about your rights that these people had been threatening you, would it be natural, sir, to assume that you would have mentioned it to him?

A. I just didn't know that.

Q. This statement was typed and signed—typed and at least presented to you for signature after seeing your attorney? A. Yes, it was.

Q. Now, when did you first become acquainted with the nature of the charges against you, sir?

A. Well, he mentioned them Saturday.

(Testimony of Charles E. Smith.)

Q. Now, on Saturday, didn't they mention them to you at the time that they arrested you?

A. No, they didn't.

Q. What you think they was arresting you for?

A. I had no idea.

Q. Did you inquire?

A. I asked them and they just smiled at me; they just went to their cars and that's it.

Q. They just smiled at you? A. Yes.

Q. I wonder if I could inspect the Court's file for just a minute? [214]

The Court: You may.

(Thereupon, Mr. Plummer began to inspect the Court's file.)

Mr. Plummer: What I'm trying to find in here, your Honor, is the original return and—of the warrant.

The Court: I'm sorry; I can't help you, counsel.

Mr. Plummer: I don't even know whether they're kept in the file. I think it would be. (Pause.) I don't want to waste the time of the Court, but I am——

The Court: Well, you may be able to give it to the In-Court Deputy, maybe she could help you while you are examining on something else.

Q. (By Mr. Plummer): Now, was it your testimony, Mr. Smith, that at the time that the officers came to the house you were as a matter of fact in the house; that is, at your parents' home in Renton, Washington?

A. That they come in the house?

(Testimony of Charles E. Smith.)

Q. That at the time that they arrived there, that you were at home inside the house?

A. Yes, I was home.

Q. And where were you inside the house?

A. I was talking to him on the phone.

Q. They were outside at the door, though.

A. They was talking to me—see, they talked to me all the way up there. This fellow explained to me up there that [215] they can talk to you right from the patrol car, so, they talked to me right at the last second.

Q. You are positive at the time that they knocked on the door that you weren't in the closet?

A. No.

Q. Had you just been in the closet?

A. No.

Q. Did you just go into the closet?

A. No.

Q. And is it your testimony, sir, that you were never arraigned while in Washington?

A. Not to my knowledge.

Q. Is your testimony that you have not—were not arraigned while in Washington, sir?

A. (Pause.)

Q. Let me ask you, sir, if you ever appeared on February 21st, before a Mr.—

The Court: You mean "March", don't you, counsel? It apparently is an undisputed fact that he was not arrested until March 15th; therefore, he could not have been arraigned in February.

Mr. Plummer: I am trying to—I'm sorry, your

(Testimony of Charles E. Smith.)

Honor, I have the wrong document here. I am——

Mr. Nesbett: I think Mr. Plummer is looking at Walker's papers. [216]

Mr. Plummer: I am—I was trying to make heads and tails out of it and I couldn't—that was probably the reason. May I have just one more minute, your Honor?

The Court: You may. Let's get the jury back down and excuse them. There is no use keeping them any longer, Mr. Johnson (Court Bailiff), please. It's now 4:30 and it's obvious that the balance of the day will be consumed in this problem. Could we start at 9:00 o'clock tomorrow morning? Tomorrow is naturalization ceremonies and we will not be able to start this trial until 10:30. The next morning the Court is committed at 8:00 o'clock for two hours on another problem. It looks like we will have to plan a night session as much as I dislike it.

(At this time, the jurors were brought back into the courtroom by the Court Bailiff.)

The Court: Let the record show all the jurors are back and present in the court. Ladies and gentlemen of the jury, this proceeding has taken considerably longer than anticipated by counsel and the Court. It is obvious that we cannot conclude today and therefore, I do not want to keep you any longer. Without objection, then, you are now excused to report tomorrow morning at the hour of 10:30. Bear in mind, tomorrow morning we have naturalization ceremonies which this Court must conduct and we will not be able to resume the trial

(Testimony of Charles E. Smith.)

before 10:30, at the earliest. As you know, I must instruct you not to discuss this case among yourselves nor are you permitted to let others discuss [217] it with you. You may now be excused. The Court will remain in session.

(At this point, the jurors left the courtroom.)

The Court: Let the record show all the jurors are absent from the courtroom. You may now proceed, Mr. Plummer.

Q. (By Mr. Plummer): Now, Mr. Smith, do you deny that on the 19th day of March, you appeared before the Commissioner, a Mr. John A. Burns down in Seattle and at that time you were accompanied by your attorney, Richard D. Harris, and that the Commissioner read the charge in the Complaint and explained it to you? Do you deny that at this time?

A. If he did, I don't remember.

Q. Do you deny that he did it?

A. There was so much junk going on there, I don't remember what the heck happened.

Q. Well, you remember apparently the last part of the proceeding, I guess, from your testimony; was that right what happened after they finished reading the Complaint to you and advising you of your rights? Wasn't Mr. Harris along with you at that time?

A. Up in——

Q. In front of the Commissioner.

A. Yes, he was there. He did all the talking; in fact he did everything. I just sat at the desk. [218]

(Testimony of Charles E. Smith.)

Q. Did the Commissioner do any of the talking?

A. He was talking to Mr. Harris. I was sitting back with my dad and mother.

Q. Do you deny that the Commissioner read the Complaint to you and advised you of your rights on the 19th day of March, in the Commissioner's Court in Seattle, Washington?

A. The only thing they was arguing up there that I know was about that extradition.

Q. I ask the Court to take judicial notice of its own files and especially that item in the file marked "Record of Proceeding of Criminal Cases", the report of the proceedings in front of the United States Commissioner, John Burns, which is opened in the file. I have no further questions.

The Court: Motion is granted. You may proceed, Mr. Smith—or, Mr. Nesbett, on recross—or, redirect.

Mr. Nesbett: Could I see that file, your Honor?

The Court: Yes, I have marked it for your convenience. Let's take a little recess.

Mr. Nesbett: I have no other questions, your Honor.

The Court: Very well, then.

Mr. Kay: I would like to ask a question. I am not sure what my status is in asking.

The Court: That is the point. I was going to call your attention to it. I doubt if you would have the right, counsel. [219]

Mr. Kay: Well, I certainly represent a separate defendant here who has an interest in this state-

(Testimony of Charles E. Smith.)

ment because there are some hearsay statements contained in the statement and I think I have a perfect right to inquire as to whether or not—the circumstances. I only want to ask a couple of questions which may or may not be objected to; I don't know.

The Court: What is your position, Mr. Plummer?

Mr. Plummer: I have no objection.

The Court: Very well, you may proceed.

Q. (By Mr. Kay): Mr. Smith, you were sitting here in court this morning when Mr. Harkabus testified, were you not? A. Yes, I was.

Q. Did you hear Mr. Harkabus state that at the jail on, I believe, Sunday, that Pass, Officer Pass made the statement to you something like this: "based on past experience, if you make a full confession it will go a lot easier with you". Did you hear Mr. Harkabus so testify?

A. Yes, I did.

Q. Did Pass make such a statement to you, either that, or similar to it?

A. Well, made one similar to it.

Q. Can you recall what the gist of the statement or the exact words or close to the words that Pass used?

A. Well, he told me, I believe, that if I would cooperate, that [220] it would go easier on me.

Q. Did Officer Pass' statement so made to you at that time influence you in any way in making your statement?

A. Well, I made it right after that.

(Testimony of Charles E. Smith.)

The Court: Any redirect?

Recross Examination

Q. (By Mr. Plummer): You had had a chance to see your attorney, Mr. Harris, of course, before making the statement and before signing the statement, hadn't you?

A. The statement was already made before I seen Mr. Harris.

Q. Typed and presented to you?

A. Pardon?

Q. Was it typed and presented to you?

A. No, it wasn't.

Q. By the time it was typed up and presented to you and you finally got around to signing it, you had had an opportunity to see Mr. Harris?

A. Yes, I did.

Q. Fine.

The Court: Very well. You may step down. You may [221] call your next witness, Mr. Nesbett. Did you have another question?

Mr. Nesbett: No, I have no other witnesses, your Honor.

The Court: Very well. Then, I will hear argument of counsel.

Mr. Kay: We were about to take a recess. Let's take a short one before we argue.

The Court: I want to finish this up today, counsel, as you can see the need for it. How much time—five minutes? Will that be sufficient for you? The

Court will go into recess for a period of five minutes.

(Thereupon, following a short recess the following proceedings were had:)

The Court: You make an objection; then, I suppose you should move first.

Mr. Plummer: For the sake of the record, I don't know whether it's necessary or not, but I at this time renew my offer into evidence, Plaintiff's Exhibit No. 20.

The Court: Very well.

Mr. Nesbett: And I object to the admission in evidence, your Honor, upon several grounds, the first ground being that there has not been sufficient proof of the corpus delicti yet. There is no proof yet that a crime is committed. It's not the proper time to attempt to introduce a statement. Secondly, on the ground the statement—— [222]

The Court: Pardon me. In that respect, is there any evidence before the Court that this Defendant did negotiate any of these checks?

Mr. Plummer: Yes, by a lady Shields on Count One and Helen Burnett on Count Five of the indictment. They both testified from the stand and both testified that the checks, as I recall were no good and that they never received any payment for them.

The Court: Yes. Very well.

Mr. Nesbett: Upon the second ground, your Honor, that the statement was taken in violation of Rule 5, Federal Rules of Criminal Procedure. That statement was taken without advising the Defend-

ant of his right to counsel; that the statement was obtained upon a promise of leniency made to the Defendant.

Your Honor, the main defect of this statement and the reason that I am certain that it is inadmissible in evidence is that the very thing happened that the law attempts to guard against and that is holding a Defendant in jail without arraigning him for the purpose of obtaining a statement and that is exactly apparently what was done here — exactly what was done. There is absolutely no reason for not having arraigned this man on Friday when he was picked up at about maybe 3:00 or 3:30. There was no reason for not arraigning him on Saturday. There was no reason for not having arraigned him on Sunday, even; and it's certainly absolutely inexcusable that he wasn't arraigned [223] on Monday, but even if you accept the statement of Burns, there, the Commissioner, that he was arraigned in Seattle, which there seems to be some confusion on, he wasn't arraigned until Tuesday, following a pick-up on Friday. During all of that time he was held in jail, during a good portion of the time, and up until the time he made the statement he was under examination by officers, anywhere from two to three, and I believe on one occasion a total of four. Your Honor, that applies right in the face of the rule, Rule 5, and in the face of the Supreme Court decisions. There is no question in my mind but what Officer Pass promised this man leniency when he told him that if he would make the statement things would go a lot easier for him. Now, I

believe the Defendant's testimony when he says that. Harkabus even substantiated it. As much as he hated to, he finally had to admit that a statement in gist as follows, which is one way Mr. Harkabus likes to state the substance of testimony. He likes to phrase it in his own words and he says the substance of the Defendant, or, rather the statement made by Pass was that "things would be easier if cooperation was given", or words to that effect. The words the Defendant remembers are that "if you give the statement things will be a lot easier for you", and that he gave the statement shortly thereafter.

Your Honor, I think the Defendant has plainly outlined the situation. I think the officers did brush his mother aside and walked right in because they had made the telephone call and [224] had determined that Mr. Smith was in the house. They made an illegal entry right then and there and as near as I can determine the facts as we have them now. The Defendant does not—did not receive any warrant, was not told why he was arrested. There was no search warrant, under any testimony, in order to enter his house. If they had a warrant, it was certainly never produced. Harkabus didn't see it. No one else is here to testify that there was a warrant used.

The Court: Is there one in the files, counsel for the Government?

Mr. Plummer: There is one in your own file, your Honor. There is a warrant showing there was one issued on the 14th, yes.

Mr. Nesbett: Now, the examination that the Defendant was put through on Friday afternoon resulted in the signing of a waiver for extradition purposes. That was a somewhat lengthy interrogation. Nothing was admitted. He was interrogated again on Saturday. Completely disregarding any duties that the officers might have had with respect to arraignment, they continued to interrogate him and continued the interrogation for a period of three hours on Sunday. Now, your Honor, it's absolutely inexcusable and certainly, you can't reconcile it and reason with the statement of Harkabus that the Defendant was advised of his right to counsel and of the fact that any statement he might make would be used against him when you think of that testimony in [225] connection with what admittedly happened regarding the call of attorney Harris. Now, Harkabus strained the point at the proper time to try and help the Government's case, in my opinion. He is an old-timer at it, and I think that he first did it, your Honor, when he admitted—when he stated that he had heard the officer announce his identity before going into Smith's home, when he was some fifty feet away, and after he said he heard the officer announce his identity, he decided he better back up and not say any more about it and not be acquainted with any more of the conversation, so I couldn't get any more out of him, out of what he heard there. He didn't hear anything, so he just backed right off from that session. I think he strained his testimony there and backed right off like an experienced man would. I think he

strained his testimony again when he testified concerning Harris' attempt to get in and see Smith, at the time they were questioning him because there is no way to reconcile a clear thinking law enforcement officer like Harkabus, and the testimony that he could and should give, with the mess he made of it up there for a few moments when he had Pass going out to talk with the attorney and saying in one breath that Pass came back with the attorney, but saying also when Pass came back that he said to Pass, "maybe we better let the attorney see him". He never straightened that out in my mind.

Now, there you have a man at the end of, practically at the end of the third grueling period of examination by these officers; [226] his attorney finally gets near him, attempts to see him and the jailer announced that he is there; Harkabus admits that. Nothing was done, Harkabus says, and here is when he strained his testimony again, in my opinion, and the jailer said, "in Federal cases—", mind you, your Honor, "in Federal cases I—" I, the jailer, "don't have to let them in unless I want to". That doesn't add up at all. It doesn't add up, but Harkabus says that is what he understood happened. Of course, he was quoting, in gist, again, as he loves to do, but the Defendant's testimony certainly is reliable enough there. The jailer came in and says, "there is an attorney here from the Defendant's father and he wants to see him". Harkabus says, "he can see him when we get through". Fifteen or twenty minutes later, Harkabus admitted it was at least twenty-two—twenty-five minutes

later, still being examined here by Harkabus and the other two officers. The jailer comes back again and says, "the attorney wants to see him and I think the attorney has a right to see him", and the Defendant says that Harkabus then said, "We will be through with him shortly. He can see him when we are through". The next thing that occurred is, somehow, or other, I think the jailer probably is the one that is responsible for it, he opens the door and lets the attorney walk in a step or two. Still no one of these officers, that is supposed to have taken so much pains to notify him of his right to counsel, say, "Now, you can see this attorney, Smith, if you want to". They all sat there quietly while the attorney is doing [227] his best to see the man. Now, here is the man at the end of the third day and three hours of grueling questioning. He's admitted some statements. He's in the mood to sign. Pass has said, "If you will sign, it will go a lot easier". He doesn't want to make these officers mad at him; he's tired of the whole thing, sick and tired of it and so what does he do? The officer—the attorney says, "Is there anything I can do for you", and he says, "no". Well, he thought there wasn't. He didn't know that he had a right to get up and walk out with the jailer, at least into private quarters in that jail and talk with his attorney. He had that right. No one of these law enforcement officers told him.

Your Honor, that is inexcusable—all before arraignment, which should have occurred sooner.

Now, there, your Honor, is the gist of my objection, and I invite your Honor's attention to the

Mallory case. I assume——

The Court: I am familiar with that case.

Mr. Nesbett: Are you very familiar with it, your Honor?

The Court: Yes.

Mr. Nesbett: Do you have the citation, I suppose?

The Court: Yes, not in this case, but I have had it in many other cases.

Mr. Nesbett: And, your Honor, the Carignan case, I suppose your Honor is very familiar with that case, where the same rule is touched upon and as the ruling in the McNabb case [228] reiterated in the Carignan case and certainly as late as 1957 in the Mallory case expounded in no uncertain terms and there in that case, the Defendant was arrested at 2:30 in the afternoon. The statement or confession was obtained at 10:30 that night and he was not arraigned until the following day and the statement was not admitted in evidence. The Courts say and without any hesitation, with no equivocation now, "you must follow Rule 5". They didn't do it here. They ignored it. Now, whether they ever went through a form of arraignment on the 19th, I don't know. I don't know.

The Court: Well, without better evidence, the Court will have to presume that they did.

Mr. Nesbett: But, if they did, that was on the 19th and that was on a Tuesday, your Honor, and so it cannot save the situation here as far as the Government is concerned.

If your Honor is familiar with those cases, I have

nothing more to say. I was going to read something in connection with the Rule in part, of the opinion, but if your Honor is familiar with it——

The Court: No, I have considered that in—on recent occasions. The Court is of the opinion and hereby rules the objection will be sustained. I feel that this is a case where they have not complied with the Rule set forth, No. 5—without argument of counsel, for the reason that there is four days that elapsed between the date of arrest and the date of the first [229] arraignment, and I feel that based upon those facts, plus the others, there is sufficient grounds to justify the Court's position.

Mr. Plummer: May counsel be heard just briefly, your Honor?

The Court: I think not, counsel. The Court's made up its mind based upon the evidence. I wouldn't want to waste your time or counsel's, but for the record, I have no objection to you stating something for the record.

Mr. Plummer: Let me just say, briefly, your Honor, the McNabb case which counsel mentioned is a landmark case. Of course, it doesn't say as long as a statement is made while the man is in confinement it's not admissible. There has to be that, plus the duress and pressure brought on him. There was no indication that there was pressure being brought here. Counsel also made a statement about the Mallory case. It doesn't even touch on our case here. The Mallory case, if your Honor is familiar with it is because there was not reasonable cause to make the original arrest. The original arrest was faulty.

Now, in this case, the arrest was perfectly legally valid and unless something happened after that arrest, some pressure was brought against this man, there was no reason in the world why he couldn't give a statement. Now, let me throw this out to your Honor, too, while I am here. Now, and I think it's very important that your Honor consider this before ruling——

The Court: The Court's ruled. [230]

Mr. Plummer: Well, let me say this, then: that not one word, not one word, has been said in this court to your Honor, showing any requirement of any kind that the law was not complied with at the place of the arrest, which is the law of Seattle, the law of Washington. The Federal Rules of Criminal Procedure has nothing to do with an arrest made down in Seattle, Washington.

The Court: No, but this Court is bound by the Rules of Federal Procedure.

Mr. Plummer: But, the arrest wasn't made in this court, your Honor, or in this jurisdiction. It was made down there.

The Court: I appreciate that, but I wouldn't want to consider that meritorious argument.

Mr. Plummer: And the statement was not taken by any Federal law officer. It was not taken by any Federal officer at all. It was taken by Mr. Harkabus, who is not a Federal officer and certainly, he should not be bound by Rule 5.

The Court: Oh, counsel, this Court is bound by the Rules, regardless of who may come before it.

Mr. Plummer: But, your Honor, Mr. Harkabus

—I mean, this Rule 5 is telling about Federal officers. Mr. Harkabus isn't. This fellow could have told his mother or me or anybody.

The Court: I don't find anything here about a Federal officer. It says, "An officer making an arrest shall take the arrested person——"

Mr. Plummer: And last, but not least, I want to point [231] out to the Court the case of *Symons vs. United States*, found in 178 Fed. 2nd, at Page 615, which is, of course, the 9th Circuit case and pointing out that at least in this Circuit and Seattle is certainly in this Circuit, that the statement, that he should be taken to the nearest available Commissioner. It doesn't mean that he has to be taken there right away—has to be taken only during regular office hours.

The Court: Of course, in this case we have four days among which we have had two regular office hours; that would be Friday from 3:30 until 5:00 o'clock, and all of Monday. That is the thing, counsel.

Mr. Plummer: If the date is right on there, it probably would be. I didn't check to make sure.

The Court: I am relying upon your statement, counsel. No one has disputed you, so I assume it to be correct.

Mr. Plummer: No, it's not correct. Would you please read this? Would you please read the first paragraph and then the second paragraph, "on the 19th," it says, "he again appeared before me." The first paragraph is dated on Monday, on Monday, the 18th.

The Court: Naturally, I had to rely upon you, counsel.

Mr. Plummer: I'm sorry I misled the Court. I'm sorry I misled the Court. I was in a hurry trying to not take up the time, any more time than necessary, so, the rule of the Symons case clearly applies. I would request that the Court not render [232] decision on it until tomorrow morning, for—because by the testimony of the witnesses, the Defendant himself, it was late in the afternoon on Friday and he was taken there on Monday morning—Saturday and Sunday not being business days for Commissioners in Washington.

Mr. Kay: Is that—are you testifying to that? It's business hours here and they hold the arraignments on Sunday in the Territory of Alaska.

Mr. Plummer: He was not arraigned here.

Mr. Kay: I don't know whether the Commissioner holds office hours on Saturday or not, but if you are going to testify I will testify that they do in Portland.

The Court: Well, that is—let's not go beyond the record, counsel. That won't help the Court one iota.

Mr. Kay: What was the hour on Monday?

The Court: It doesn't state.

Mr. Plummer: Possibly the Defendant would have some idea. It just says the date, no hours are given.

The Court: Are you through, counsel?

Mr. Plummer: Yes, sir.

The Court: Very well, the ruling of the Court will stand. The trial of this case will be continued

until tomorrow morning at the hour of 10:00 o'clock a.m. and this Court will stand adjourned until tomorrow morning at the hour of 9:00 a.m. when this Court will conduct naturalization proceedings.

(Thereupon, at 5:10 o'clock p.m., February 24, 1958, court was adjourned to the next morning, this case to be resumed at 10:30 o'clock a.m., February 25, 1958.) [234]

February 25, 1958

Proceedings

The Court: Mrs. Bradley, will you please come forward and take the oath.

LOIS BRADLEY

called as a witness for and on behalf of the Government, and being first duly sworn, testifies as follows on

Direct Examination

Q. (By Mr. Plummer): Will you please state your name? A. Lois Bradley.

Q. And what is your present occupation?

A. I am Clerk of the Criminal Court in the United States Commissioner's office.

Q. Did you at my request bring a certain file from your office down to the courtroom?

A. I did.

Q. And would you tell me what it is, sir — or, ma'am.

A. Well, it's a copy of the transcript that was sent to the District Court of the case against— United States vs. Charles Edward Smith.

(Testimony of Lois Bradley.)

Q. And is that your official record?

A. It is.

Q. Down in your court? [237] A. It is.

Q. Would you look the transcript over and tell me what, if anything, appears there on March 21st, under the date of March 21, 1957?

Mr. Nesbett: Your Honor, Mr. Plummer hasn't observed the usual rule of showing us the document that he intends to question the witness on, and I object to the question that's now, as yet, unanswered, on the ground that it has not been shown that she is looking at an official record.

The Court: Counsel, could you present the record to——

Mr. Plummer: Yes, I didn't want to keep anybody here over the noon hour and as a matter of fact, I didn't, your Honor, intend to offer this, if I could get away from it because it is their official record down there. I was merely going to have her tell what it says. I, through the Court, will apologize to counsel for not observing the proprieties.

The Court: The Court accepts your apology. Thank you. You may proceed.

Q. (By Mr. Plummer): I ask you if you will, Mrs. Bradley, look at your transcript and advise the Court and the Jury what appears under date of March 21, 1957?

Mr. Nesbett: I will object, your Honor, first, on the ground that as I said before, the document has not been identified as an official record, firstly. Secondly, on the ground that [238] the document is

(Testimony of Lois Bradley.)

complete—has no relevancy whatsoever to the proceedings here and I ask if your Honor would take a look at it yourself. It's simply a self-serving attempt to cast innuendo and nothing else; has no relevancy whatsoever. There's been—the indictment is before the jury.

The Court: The objection is overruled on the first ground because the evidence as I recall is this witness testified that it was. As to the second ground—just a moment, please. Would counsel approach the bench, please.

(Thereupon, the United States Attorney, together with defense counsel and the Court Reporter approached the bench and the following proceedings were had out of the hearing of the Jury:)

The Court: Mr. Plummer, what is your purpose of——

Mr. Plummer: To show, your Honor, that he was arraigned—let the jury know what you, of course, heard in yesterday afternoon's discussion, having been arraigned here on March 21. Subsequent to that he made oral admissions to various people around town and it is my intention to call them and have them testify as to the oral admissions he made, which is perfectly proper. I want to first, of course, want to bring out that he was arraigned and his rights were advised by a Commissioner here and then, of course, any oral statement he might have made to anybody subsequent to that time is properly admissible.

(Testimony of Lois Bradley.)

The Court: What is your position, Mr. Nesbett?

Mr. Nesbett: Well, the witnesses are before us and he's not offered that testimony. I say as to this right now, it's absolutely irrelevant and has no connection whatsoever with this case, your Honor. It's designed only to cast innuendo because he has been indicted. They're trying him on the indictment. This has no relevancy.

The Court: It's your position then, that he can call these witnesses without proving this——

Mr. Nesbett: It's my position he can't call a witness at all for that purpose.

Mr. Plummer: What basis, Mr. Nesbett, through the Court, I will ask, on what basis?

Mr. Nesbett: I am not arguing that right now, Mr. Plummer, but that is going to be my stand, of course, and this has nothing whatsoever to do with the issues here that he has been indicted. It would be just like you could multiply that, your Honor, and show that he had been charged two or three or four times and it might accumulate effect as far as the jury is concerned and have a weight far beyond its real significance.

The Court: I would suggest to counsel for the Government that you offer it for identification as No. 23. The Court at this time will have to sustain the objection, and then it will be available in the event it becomes necessary at a later time.

Mr. Plummer: I think, before we conclude our hearing, [240] that this jury certainly has a right, when they're going to be asked to evaluate the

(Testimony of Lois Bradley.)

weight and credibility, especially in view of the standard instruction that your Honor gives as to oral admissions, to know that at the time the witness testifies, that the Defendant Smith had previously been arraigned before the United States Commissioner and advised of his rights. I think they cannot properly evaluate the weight and credibility of the testimony without it.

The Court: Well, the objection is sustained for the time being and it may be admitted unless you have objection to it—for identification purposes, only, as Government's Exhibit No. 23.

Mr. Plummer: Can this witness testify from it?

The Court: Well, at this time, Mr. Plummer, I do not believe that it's admissible. Now, I point out to Mr. Nesbett that if by chance you do object to the witnesses that Mr. Plummer intends to call, and this being a basis therefor, then, of course, at that time, the Court can reconsider the offer.

Mr. Nesbett: Your Honor, could we do this: could we convene court without the Jury at 2:00 o'clock and argue Mr. Plummer's point. If he is right, then, of course, let the tail go with the hide, but if he is not right, settle the thing once and for all.

The Court: Well, I am not going to exclude spectators from the courtroom any more during this trial unless there is [241] something that I can't anticipate and furthermore, I am not going to exclude the jurors unless argument be had, now, concerning argument at the bench on that basis.

(Testimony of Lois Bradley.)

Mr. Plummer: Now, this will be 23 for Identification?

The Court: Yes, only.

(Thereupon, counsel for the Plaintiff and the Defendants resumed their seats and the following proceedings were had in the presence of the Jury:)

Mr. Plummer: Your Honor, may Miss Bradley make a copy and substitute it for this one?

The Court: Any objection?

Mr. Nesbett: No objection.

The Court: Very well. Mrs. Bradley, will you do that during your lunch hour, then? Thank you. Unless—you may be excused then unless counsel had cross, which I doubt, at this time.

Ladies and gentlemen of the jury, it's now after twelve; therefore, the trial of this case will be continued until 2:00 p.m. As you know, I must instruct you not to discuss this case among yourselves, nor are you permitted to let others discuss it with you, and this court will stand in recess until 1:30.

(Thereupon, at 2:00 o'clock p.m., the following proceedings were had in the presence of the jury:)

The Court: Will counsel stipulate that all the jurors [242] are back and present in the courtroom?

Mr. Plummer: Yes, your Honor.

Mr. Kay: Yes, your Honor.

The Court: Very well, thank you. You may call your next witness, Mr. Plummer.

Mr. Plummer: I'd like to call Mr. Edward Dankworth.

Mr. Nesbett: Your Honor, before this witness testifies, may I approach the bench with Mr. Plummer?

The Court: You may.

(Thereupon, counsel for the Plaintiff and the Defendant, together with the Court Reporter, approached the bench and the following proceedings were had out of the hearing of the jury:)

The Court: Mr. Nesbett.

Mr. Nesbett: Your Honor, I only know this witness by reason of the fact that he introduced himself to me in the hall just a moment ago, but apparently, he runs a lie detector for the Territory of Alaska. Now, I don't know whether he is one of the witnesses Mr. Plummer said he'd call in connection with admissions made by the Defendant after his arraignment here on the 21st or not, but the mere fact that if he does identify himself as an operator of that, that piece of equipment, and his later testimony should be included by reason of the arguments Mr. Plummer and I will have here at the bench on the admissibility of admissions. I think it would be damaging and therefore, I want [243] to settle this matter once and for all, right now, before your Honor, as to whether or not he can call this witness to testify as to admissions made after this arraignment here.

The Court: Well, of course, I am perfectly willing to go ahead at this time and listen to your argu-

ment, if there is any more objection on the part of the Government.

Mr. Plummer: I will first advise the Court that because of Mr. Nesbett's apprehension about the mention of the word "lie detector", it was not contemplated that that would be brought out, but it could very well come out through inadvertence, you know. On the other, I'd be glad to argue it now, or when the time is appropriate.

The Court: Well, let's proceed right now.

Mr. Nesbett: Thank you, your Honor.

The Court: Very well, you may proceed, Mr. Nesbett.

Mr. Kay: Would you want to argue here at the bench?

The Court: Yes, I do, so as not to inconvenience the jurors, unless there is some reason to the contrary.

Mr. Kay: No, except it's more convenient to be back at your desk; since I am not arguing it, though——

The Court: You may proceed, Mr. Nesbett.

Mr. Nesbett: Your Honor, it's my contention that the illegal detention which occurred in this case, the prevention of the defendant from seeing his counsel, which was brought out in the testimony yesterday afternoon, carries over and prohibits [244] the introduction of any admission made by the Defendant to any officer even though it might have been after what was apparently his second arraignment here in Anchorage upon—about March 21st. Now, the reason for the rule is plain enough.

The Defendant was not—the Defendant was not, apparently, advised of his right to counsel. He did not get to see his counsel at the time he was entitled to. He was not speedily arraigned in accordance with Rule 5, but was detained. A confession was obtained from him under those circumstances which is not admissible as your Honor properly ruled. Now, he is still in custody, still has not seen his attorney nor any other attorney and is brought before the Commissioner here and presumably advised of his rights. He still is in custody on \$10,000.00 bail when he is taken around by officers who ostensibly, for the purpose of identifying places he's mentioned in his statement, or, escorting him around. Now, it is possible, during the course of that investigation, you might say by the officers, statements were made. Now, those statements were made, your Honor, because the bars had already been let down; as far as the officers of the law were concerned, a violation had been committed. The violation of Rule 5 carries over the Defendant is under the same coercion. The Defendant is still without counsel; his bail is \$10,000.00 and it remained that way until those officers got through with him when it was reduced to \$2500.00 and he finally got out.

I say, it carries over and they absolutely are not admissible [245] because they are a part of the original violation of Rule 5, and the Defendant's rights, constitutional rights, as well.

Now, your Honor, the case of Carignan is very familiar to your Honor. There, in that case, the Defendant was being detained. He had been detained

for six weeks on one charge. During the course of that detention on that one charge, he admitted another entirely different crime and the courts split six to three and they said that, finally, that they would allow the admissions of the Defendant made while being detained because he was being legally detained; the confession obtained was not coerced and it was of another crime, another crime, but three of the justices even dissented on that basis. They said, "even though there was no coercion to get, used to get the confession, that is a method implied by the officers to keep the man in custody and stay around and get confessions, and we are not going to go for that sort of thing". Now, that is in Carignan, although the facts of the case apply to this one in any event because it was confession of another crime.

Now, your Honor, in the case here, the Mallory case, applies the wording of the Mallory case. Now, that is a 1957 decision and at the bottom of the page——

The Court: Pardon me, in that case, there was not—even a legal arrest.

Mr. Plummer: That was the precise case that turned upon the point that there was not probable cause, so the original [246] arrest of the fellow was illegal. That is the point of the Mallory case.

The Court: So, you see, that could not apply in this case here because you won't argue to the Court that this Defendant was not in proper custody at that time. He was arraigned twice; once in Seattle and once here.

Mr. Nesbett: Yes, but I am arguing that it all grows out of the same contention that it can't—and under the wording of the Mallory case, it said, "Not until he had confessed, when any judicial caution had lost its purpose, did the police arraign him". (Page 455.)

Now, your Honor, all judicial caution, all protection set up for the protection of this man had been lost to him already when these officers took him around in their car, while he was still in custody and still without counsel.

The Court: Very well. Is that all you had?

Mr. Plummer: Your Honor, to set the record straight, I think, your Honor, the court file will reveal that Mr. Nesbett's facts are somewhat—are not in accord with the true facts of the case. They will show that he was arraigned on the 18th day of March, down in Seattle. I think he had an attorney present at that time. The file will also show that Mr. Harris represented him at a subsequent proceeding, on the 19th day of March. The testimony to the Court yesterday by the Defendant himself was that he saw his attorney on the preceding Sunday, which [247] was the 17th, your Honor. Now, I have, and I think the Mallory case is not in point, for the reasons which I have heretofore given the Court and certainly, the Court should not be bound by any dissent in the Carignan case.

Now, I think the proper rule is given in the case of *Nordone vs. United States*, which is found in 308 U.S. at Page 338. Now, this was not—this case was not a case of illegal detention, but it was a wire

tapping case and Justice Frankfurter wrote the opinion and I think the part that we are particularly concerned about is found on page 341 of the opinion and he sets out the rule there that the proper rule is that if the subsequent admissions, and so on like that, are fruits of the illegal venture in the first place, that then they should be excluded, but if they are not, if the Government had independent evidence and things of that nature, that the Government should be able to go ahead and elicit the testimony.

Now, on this case, I want to call the Court's attention to the fact that there was certainly probable cause to have this Defendant arrested because the Complaint was issued and a warrant issued on this—on March 14, 1957. That was long before he ever made the Exhibit 20 for identification, only, and in addition to that this witness who is now on the stand will testify under oath that he has never read Exhibit 20, nor was Exhibit 20 ever read to him.

The Court: Well, the Court—— [248]

Mr. Kay: Could I be heard briefly?

The Court: Yes, but I want—the Court would like to have it further understood that the Court has ruled as to the admissibility, or inadmissibility of the statement.

Mr. Plummer: Yes, sir.

The Court: That is final, therefore, any reference to that statement by any witnesses, the Court would consider to be highly improper.

Mr. Plummer: Yes, sir.

The Court: Because you can't come through the

back door if you can't come through the front door.

Mr. Plummer: I have cautioned him numerous times and I am sure he will not do that.

Mr. Kay: I believe the law to be on this question: that the real question is: did the inducement which produced the original confession continue and produce the second or subsequent admissions? Now, in this case, and under the rules, it is quite clear that the burden is on the Government to show that the inducement has ended or terminated if they seek to introduce evidence, subsequent statements or admissions when a prior confession has been excluded. Here, what was the inducement? As counsel pointed out, by Mr. Nesbett, the undisputed testimony that he had been advised that it would go easier with him if he confessed. There's been no negative of that influence continuing. In other words, once he had made a statement that influence would [249] continue on. If anybody asked him subsequently, "did you make a statement", he would naturally say, "yes", unless they simply advised him that inducement was wrong or terminated and it was not going to go easier with him.

The Court: Counsel, the Court has made it clear that the Court will not permit any witness to be called and testify concerning that statement, period.

Mr. Kay: I see.

The Court: Of any kind, whatsoever.

Mr. Nesbett: Judge, one more point. Now, you said you wouldn't allow him to come in the back door where he couldn't go in the front door, or words to that effect, he couldn't accomplish indi-

rectly what he couldn't directly. Here, the damage was done, all done at the time of the illegal detention in Seattle. There, it was done; there, the statement was made; there, the four page statement was made up; there, the Defendant was broken down. Under the circumstances, the law will not condone when still in custody and still not allowed the advice of counsel, although he may have—perfunctorily may have been advised of his right. He is still escorted around by the law and kept in jail between times. Your Honor, the spirit of the rule simply wouldn't permit the admission. Now, if it were independent facts they were attempting to elicit of some other crime, I would say the Carignan case might apply, but there isn't—is no such thing. What they want to do is elicit the facts in connection [250] with the same crime which he was forced to confess to.

The Court: Mr. Nesbett, apparently, you take the position that once evidence is adduced illegally, that there can be no evidence of a subsequent nature that can be produced thereby?

Mr. Hepp: I would like to——

Mr. Nesbett: To carry on with my point, the evidence, or, rather the confession which is stricken—you admit the confession is not permitted to go into evidence?

The Court: Yes.

Mr. Nesbett: Now, that being the case, the law officers cannot, in the psychological, confess under illegal circumstances, carry him around from place to place and ask him this and ask him that, in con-

nection with his confession. They had that all in mind; they were using that confession to locate spots and so on; they said so themselves in the hearing here, and it was during those conversations and those circumstances that he wants to bring up this evidence thru the back door that would not be admissible directly, thru the confession itself.

The Court: Mr. Hepp?

Mr. Hepp: I have only one thought, your Honor, and that is, it suggests to me that it is—it leaves us only a speculation on the part of the Court or Jury with, as to—if this confession which has been ruled out was not lawfully obtained, or was never obtained in the first instance, which we assume that it wasn't, if it's unlawful, would the Defendant have made subsequent statements but for the fact that he had previously made this confession and you certainly have to speculate as to whether he would or not. It's quite clear, of course, that having once told the whole story, he could only look ridiculous and say, "well, I deny the whole thing," particularly without the further benefit of counsel. It opens to speculation as to whether or not he would have ever made the subsequent statements.

The Court: Of course, the Court hasn't heard what this witness will testify to, nor the other witnesses at the present time, but I presume that the Court can safely infer that this Defendant was not coerced to go around in the car.

Mr. Hepp: Well, but my point is this, your Honor: that as it was said in the old days, "if you

break a man on the wheel, the fact that you remove the wheel then doesn't change his having been broken". I mean, the attribute, the character, the frame of mind, his disposition towards protecting himself, his constitution allows him, all those things are completely changed; once he has broken he can never recover to a former state as they say, "the wheels are removed and those who operated it are——"

Mr. Plummer: I think we are losing sight of your Honor's ruling yesterday. There was no finding by the Court—in fact, the Court would be bound by the testimony of the Defendant that, as a matter of fact, he was not denied the services of an attorney. He saw an attorney on Sunday, Monday and Tuesday, [252] and also, the Court knows from a review of the records he was arraigned down there on the 18th, and the Court, of course, would have at that time advised him of his rights in addition to which he was subsequently arraigned here; certainly——

Mr. Nesbett: He had nothing to protect any more.

Mr. Plummer: There's been no rack, or no wheel, and as a matter of fact, there was very, very little testimony to be, not at all to me, not at all to be convincing that he was induced or coerced to give the statement that he in fact did admit giving yesterday, or, yesterday admitted that he gave on the 17th, or whenever it was in March. As a matter of fact, your Honor's ruling, as I understood it, made the confession inadmissible, not because of a—

promises or threats and so on like that, but because of the illegal detention of the Defendant. I think your Honor said from the bench that he was arrested on a Friday afternoon and was not arraigned until the mistaken date that I gave you, the 19th, when it was in fact, the 18th, but I think that was the basis of your Honor's decision yesterday.

The Court: Well, so there won't be any doubt, the Court felt that the law enforcement officers had not complied with Rule 5. It's just that simple. Now, as to the questions of promises and things of that nature, I wouldn't exclude them entirely but the thrust of the ruling was upon Rule 5, and that the others were just ancillary facets and another fagot in the bundle of fagots toward the illegality of the confession obtained. [253]

Mr. Hepp: And the reason for the ruling.

The Court: Yes, that is correct—well, of course, the Court can't prejudge a matter. I am glad to have expression of opinions of counsel prior to his testimony, but until such time as it's been shown that this statement was obtained contrary to the law, I feel that the objection should be overruled pending that determination.

Mr. Plummer: I wonder, while counsel is still at the bench, if you would ask the witness to come over here so there will not be any possible mistake—admonish him not to use the word "polygraph", or "lie detector", anything like that, in his answers.

The Court: Is there any objection on that part?

Mr. Nesbett: No, I have no objection.

The Court: Will you come around, please?

(Thereupon, the witness approached the bench.)

The Court: Mr. Dankworth, Mr. Plummer advises me that you are with the Territorial Police and that you have specialized somewhat in the lie detecting?

Mr. Dankworth: That is correct.

The Court: Now, based upon stipulation of counsel, if there is no objection to the Court advising you, the Court will instruct you during your testimony, you are not to refer to a lie detector or polygraph or any other reference that may connect it up with that type of evidentiary obtainment. Do you understand [254] that?

Mr. Dankworth: Yes, sir, I understand that.

The Court: Very well, thank you.

(Thereupon, both counsel for the Plaintiff and the Defendants together with the Court Reporter and the witness resumed their respective seats, and the following proceedings were had in the presence of the jury:)

M. E. DANKWORTH

called as a witness for and on behalf of the Plaintiff, and being first duly sworn, testifies as follows on

Direct Examination

Q. (By Mr. Plummer): Would you please state your name, sir? A. M. E. Dankworth.

Q. Your occupation?

The Court: How do you spell that?

(Testimony of M. E. Dankworth.)

A. D-a-n-k-w-o-r-t-h.

Q. (By Mr. Plummer): Your occupation?

A. I am an officer with the Department of Territorial Police.

Q. Where are you stationed, sir?

A. Juneau, Alaska.

Q. Were you with the Territorial Police on or about March 7, 1957, sir? Were you employed by them on that date? [255]

A. Would you repeat the date, please?

Q. Were you employed by the Territorial Police on or about March 27, 1957?

A. Yes, sir, I was.

Q. And did you have occasion to be in Anchorage on that date? A. I did.

Q. Do you know the Defendant in this case, Charles E. Smith? A. I do.

Q. Did you have occasion to see Mr. Smith on March 27, 1957? A. I did.

Q. Would you tell us where you saw him?

A. I saw him at the Department of Territorial Police office, here in Anchorage.

Q. Did you have a conversation with him at the time you saw him? A. Yes, I did.

Q. Would you be good enough, sir, to relate what that conversation was?

Mr. Nesbett: I will object, your Honor to that. There has been no foundation laid or——

The Court: Objection sustained.

Q. (By Mr. Plummer): Will you tell us—the date, I presume, is March 27, 1957?

(Testimony of M. E. Dankworth.)

A. That's correct.

Q. The place?

A. It was the Territorial Police Headquarters, here in Anchorage. [256]

Q. And the time?

A. Approximately between one and one-thirty p.m.

Q. And the persons present?

A. Myself, Mr. Smith, and Mr. Harkabus.

Q. Now, did you have a conversation with him on that occasion? A. Yes, I did.

Q. And would you tell us what the conversation was about, sir?

Mr. Nesbett: Now, your Honor, I will object again, and ask that a hearing be held in connection with the circumstances of the evidence which we know is to be elicited from the witness by reason of our conference at the bench. I make that request for the purpose of the record.

The Court: Objection overruled. You may proceed.

Q. (By Mr. Plummer): Would you tell us what this conversation was about, sir? A. Yes, sir.

The Court: Now, just a moment, please. Would counsel come to the bench and would the witness come to the bench for just a moment, please?

Mr. Plummer: Yes, sir.

(Thereupon, both counsel for the Plaintiff and counsel for the Defendants, together with the Court Reporter, and witness approached the

(Testimony of M. E. Dankworth.)

bench and the following proceedings were had out of the presence of the Jury:)

The Court: Mr. Dankworth, because of the law, it was [257] necessary to rule that the statement made by Mr. Smith could not be admitted into evidence. Now, I did not apprise you of this, but any reference to that statement, likewise, is not admissible, in addition to the fact that you cannot refer to your employment and the type of employment that you are with, the Territorial Police. I must instruct you not to refer—if the conversation alluded to the statement because the statement has been determined to be inadmissible. You understand that now?

Mr. Dankworth: Yes, your Honor, I understand that.

The Court: All right. Thank you.

(Thereupon, both counsel for the Plaintiff and counsel for the Defendants, together with the witness and the Court Reporter resumed their respective seats and the following proceedings were had in the presence of the Jury:)

The Court: Do you remember the question?

A. I would like to have it repeated.

Q. (By Mr. Plummer): Would you be good enough to tell the Court and jury what the conversation was about, sir?

A. Yes. I was to interview, with Mr. Harkabus, Mr. Smith about a matter that has nothing to do at the present time with this case on trial.

(Testimony of M. E. Dankworth.)

Q. And did you in fact have such an interview?

A. I did.

Q. And did you conclude that portion of the interview? [258]

A. I did.

Q. And what did the Defendant say, if anything, at that time?

A. As I am testifying only to memory, there will be portions of it that I don't recall, but the portions that I do recall—the Defendant, Mr. Smith—if the Court will give me just one moment here——(pause).

The Court: Take your time.

A. As I recall the conversation, the Defendant was asked if he knew anyone who was involved in this particular matter which has nothing to do with this case. The Defendant stated that he did not want to be a stool pidgeon, or known as a stool pidgeon. He says, "I, in the past, have got mixed-up with the wrong crowd. I got mixed-up in the M-K check deal. I cashed the checks. I want to plead guilty and I want to serve my time, but I don't want to be a stool pidgeon."

Q. Do you recall anything else he may or may not have said, or you think he might have said on that occasion, sir?

A. Mr. Smith was asked what time or when did he come to Anchorage, in reference to the M-K check caper.

Q. And do you recall what he replied, sir?

A. Yes. I don't recall everything he said, but I

(Testimony of M. E. Dankworth.)

do recall this portion: Mr. Smith stated that he had arrived in his pick-up with a gentleman by the name of Volk from Fairbanks. Upon arrival in Anchorage they had stopped at the Westward [259] Inn at which time Mr. Volk left the pick-up. He had driven on to a bar somewhere within a block or two blocks of the Westward Inn. I don't recall, it seems that he mentioned the name of the bar, but it seemed like it was "Silver" something, or "Golden" something, but I don't recall the name of the bar. He said that he was to wait there for Mr. Volk to return. Shortly,—or, I don't recall the time element—it seems he said, after a while, this Mr. Volk returned to the bar that he was waiting in with a bag and two packages of M-K checks and an identification card which he had seen in the International Hotel in Fairbanks and the card, I don't recall the full name on the card, but I recall the name "Ware" was on it and his picture was on it and that the picture had been made by himself and I believe, as I recall, it could have been someone else, but it seemed like he said he and Mr. Volk had taken pictures of one another at the International Hotel. Mr. Smith stated at that time that he had asked Mr. Volk where the checks came from and that Mr. Volk advised him he was getting too nosey and it was none of his business and that Mr. Smith stated that he considered that good advice and never asked any more about it. He stated that he then proceeded with Mr. Volk to cash these M-K checks and I don't recall how many places—it seems

(Testimony of M. E. Dankworth.)

to me fifteen—ten to fifteen, I am not for sure of the number of places he said he cashed [260] them. After doing this, he had gone to, I believe a movie—yes, he had gone to a movie. I don't recall whether his movie was interrupted or after the movie, he was again contacted by this Mr. Volk, at which time he was told to—that something had happened in Fairbanks, and that it was necessary for them to return to Fairbanks immediately. He had stated that he had left his pick-up before going to the movie at a service station somewhere in the vicinity of the Westward Inn. After picking up their pick-up, they had gone out the Glenn Highway toward the Army camp and there was something he said in reference to—he recalls there was a lot of lights off to the lefthand side of the road which appeared to be a hotel or hospital or something and it was along this point in the highway that he and Mr. Volk had turned off onto a little side road, driven a short distance and stopped. There, they unloaded the merchandise they had bought with the M-K checks which consisted of some tires,—there was probably some other items, but I recall tires, battery and high-powered glasses and a hat and they had kept something, and it seems to me it was whiskey; I am not for sure, but it seems they kept some whiskey or apples or something, and that is about all that I recall, other than he says that at that time the money was in either a—wrapped in brown paper or it was in a paper bag, now, which one of the two, I don't recall, in the custody of Mr.

(Testimony of M. E. Dankworth.)

Volk [261] and they returned to Fairbanks. He was then asked if he would mind, or, if he would go out on the highway and show us where he dumped these things which he agreed to do. At that time, in the custody of Mr. Pass, and in the presence of Harkabus, Mr.—Sgt. Laird, Department of Territorial Police and myself, and Mr. Smith drove out on the Glenn Highway. Due to the snow, Mr. Smith wasn't able to find the exact road. He said he wasn't for sure just which road it was and there was a number that was leading off—at any rate, we were unable to find any of the things that he had thrown out of the truck at which time they returned and they let me out of the automobile at the Territorial Police Headquarters and that is the last time I seen Mr. Smith until this day.

Mr. Plummer: I have no further questions.

The Court: You may cross examine then.

Cross Examination

Q. (By Mr. Nesbett): That all occurred in the month of March, of 1957, Mr. Dankworth?

A. Yes.

Q. When you hesitated before you commenced to testify, were you trying to refresh your recollection? [262]

A. No, sir, I was taking in some cautions of the Court, that the Court had given me as to the wording.

Q. You weren't trying to get straight in your

(Testimony of M. E. Dankworth.)

mind the recitation you just have given, is that right?

A. No, sir, I was taking two things into consideration: the instructions of the Court and the continuity of what was said and when it was said, to begin it properly.

Q. Did you, during the time you hesitated, review the continuity of the recitation that you have just given to the Court? A. No.

Q. Now, Mr. Harkabus had Smith in custody at that time, didn't he?

A. I don't know which one of the officers had him in custody. He was in custody, but as to whether it was Mr. Pass or just who brought him out there, I don't know.

Q. He was brought to you from the jail here in the custody of those officers at the time you heard all this, wasn't he?

A. He was brought to the Territorial Police and reasonably, I suppose we could assume from the Federal Jail.

Q. And the purpose of Harkabus' purpose there was to investigate an entirely different matter than the issues in this case, is that right?

A. Yes—if the word investigate is correct. We wanted to discuss something with him with reference to another case.

Q. And did this—all this that you have recited happen just [263] casually after you completed or discussed the other matters with the original purpose of the visit?

(Testimony of M. E. Dankworth.)

A. That's true. The original purpose lasted a very short time as Mr. Smith made it quite clear, right quick, that he didn't want to be a stool pigeon and he started into this other.

Q. This other was just something that happened casually, after the main purpose had been taken care of, is that right?

A. Well, that is correct, to the extent that he had started talking after we had asked these other questions.

Q. Now, that was approximately a year ago, wasn't it?

A. Yes, March 27th.

Q. Lacking probably one month?

A. That's correct.

Q. Have you refreshed your recollection on the conversation in any fashion since that time?

A. Very little, other than discussing it with Mr. Plummer. That is all.

The Court: Any other cross examination? (no answer) Very well, any redirect, counsel?

Mr. Plummer: No, your Honor.

The Court: You may step down, Mr. Dankworth. Call your next witness. * * * * *

February 26, 1958

Proceedings

(Before convening court, Mr. Nesbett filed a written motion, on behalf of Defendant Smith, to strike testimony of M. E. Dankworth.)

* * * * *

Mr. Nesbett: Does your Honor reserve any ruling on the motion?

The Court: Well, counsel, I can't, of course, even do that, or consider it until such time as we have had a chance to argue it. The Court hasn't even considered the motion. All I have done is read the motion and I, of course, am not in a position to reserve, and/or to rule at this time until I hear counsel argue.

Now, you may swear the witness. [267]

* * * * *

February 27, 1958
Proceedings

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The Court: Very well. Mr. Nesbett, did you wish to address the Court at this time?

Mr. Nesbett: Your Honor, I have appeared before this Court a long, long time and I think your Honor has done an exceptionally good job of handling this trial in a fair and impartial manner. I don't believe it could have been handled in a more fair and impartial manner. Your Honor, I think Mr. Plummer has been a real gentleman throughout the whole trial. Your Honor, I do, however, disagree of course with some of your Honor's rulings and with some of Mr. Plummer's ideas of what is admissible or relevant evidence.

There is now pending before your Honor for ruling the Motion that I submitted yesterday in writing to strike the testimony of witness Dankworth of the Territorial Police. If your Honor will permit, I will just mention that motion briefly.

The Court: You may do so.

Mr. Nesbett: Without arguing it at any length, because your Honor, that motion is based upon the

authorities that I have argued to your Honor previously in this case at some length, at no great length because your Honor indicated in each case, or, each instance that a case was mentioned, that your Honor was thoroughly familiar with it and I know you must be.

The Court: Well, for example, the McNabb and the [270] Carignan cases, principally.

Mr. Nesbett: The McNabb, Carignan, and the Mallory case, your Honor.

The Court: Yes.

Mr. Nesbett: The motion is based on the reason for that rule, Rule 5 of the Federal Rules of Criminal Procedure, and the balance of my argument, your Honor, will deal with the facts as they have been brought before this Court by the testimony of witnesses to the extent that I am permitted to mention those facts in view of the fact that we are not now in a closed session as we were when a number of them were brought out.

The Court: Well, we are closed to the extent the jurors are not in the courtroom. The bailiff has been posted at the door to keep all jurors from coming in.

Mr. Nesbett: I think your Honor made a very wise ruling when everyone not directly connected with the case was excluded, when certain of the evidence was heard and in support of that motion I only want to invite your Honor's attention to this fact, and that is the fact that Dankworth repeated almost word for word certain prior testimony that had been given to this Court and to mention to your

Honor that the pressures, the illegal pressures, that were brought to bear upon the Defendant Smith of which your Honor is well aware by reason of the testimony taken in the closed session, were still maintained and I don't feel even though the jury is not present at this session [271] that I can go much further into the comparison that I would very well like to make for whatever worth it may be to your Honor, of the testimony of Dankworth and the prior testimony except to mention in passing this one fact, your Honor, that I think the spirit of the rule has been thoroughly aborted and that those pressures were maintained. The reason for the rule was circumvented, or attempted to be circumvented and that the officer Harkabus breathing down the neck of the Defendant Smith all of the time was the reason that produced the statements of Dankworth and they should all be stricken; otherwise, there is no reason for the rule. It's emasculated; it has no force and I can't conceive in reading cases like the Carignan case, and particularly, the 1957 decision as late as June of last year of the Supreme Court in the Mallory case, I can't conceive that those courts saying what they did in those decisions, would condone a happening such as has occurred here by permitting Dankworth's testimony to be admitted.

So much for that, your Honor.

I wish also at this time for the purpose of the record to move for a judgment of acquittal with respect to the Defendant Smith. Based upon reasoning like this, it's my sincere belief that your

Honor should grant my motion to strike. If your Honor did that, then there would be left for the consideration of the jury only the testimony of Mrs. Shields and Mrs. Burnett and I think your Honor remembers very well the testimony of those [272] two ladies. There is a transcript of that testimony and on Page 8 and 13 of Shields' testimony, your Honor will observe that the witness first denied having any information from the District Attorney or his office in connection with the location or the identity of Smith, but later, admitted that not only had she, and I refer to Shields, had the Defendant pointed out to her, but a diagram had been drawn of the seating arrangement in the courtroom for her benefit so that they could go over and take a good look at Smith. Now, maybe she would have recognized him without that assistance; I doubt it. I think the assistance was accorded to her because she requested it. Your Honor can see the danger in that sort of practice.

There was the testimony of Burnett, Mrs. Burnett, which is even less reliable because she went to greater lengths it seemed to me, in studying the transcript of her testimony, to cover up, conceal, evade, direct answers to my questions which would have, and finally, did bring out the fact that she likewise had been advised, coached, and taught, you might say, who the Defendant Smith was, where she might find him so that she could put the finger on him, so to speak, at the right time and before the right people. That is all the testimony that could go before the jury. Now, your Honor, if that were

all the testimony that went to the jury even though the jury in view of everything that has been admitted here in the way of accomplice testimony and the whole surrounding picture of the case, including the secret sessions and conferences [273] too numerous to mention, at the bench of which, of course, we assume the jury knew nothing. Nevertheless, the jury might, in view of the aura of crime that has been thrown up by this trial, find Mr. Smith guilty and I'm sure your Honor would be duty-bound to set aside that verdict. I honestly believe that you couldn't allow the verdict to stand, as being not supported by sufficient evidence, and grant a motion notwithstanding the verdict.

Now, that is all I have to say, your Honor. Thank you.

The Court: Very well. Mr. Plummer.

Mr. Plummer: Your Honor, the defendants, all three have moved for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure and I'll call your Honor's attention to the discussion in Barron and Holtzoff in Volume 4 at the very top of Page 235, where it says, and I quote: "In the decision of a motion for a judgment of acquittal, the Court must take that view of the evidence and inferences therefrom which is most favorable to the prosecution". Of course, that is Hornbrook law; cases so hold in our U.S. vs. Horton, 180 Fed. 2nd, Page 427, and Coppersmith vs. U.S., found in 176 Fed. 2nd, at Page 353, and Kowalechuk vs. U.S., found in 176 Fed. 2nd, at Page 873.

Now, there's been discussion by at least two coun-

sel and possibly three about the weight that the Court might give the testimony of the so-called accomplices. Of course, that is not the function of the Court. That is the function for the jury. [274] The only function for a court in a motion of this kind at this time is to decide whether there is evidence. It's not up to the court to decide whether it should be believed or not believed, but to decide whether there is evidence or not. The weight and credibility, of course, is for the function of the jury.

Now, let me first take up the case of the Defendant Ing.

* * * * *

Mr. Plummer: Next, as to the Defendant Wright——

* * * * *

Mr. Plummer: Now, we'll concede that Wright and Walker are accomplices.

Now, relative to the Defendant Smith, now, of course, there are admissions that he made to Officer Dankworth, which I maintained all along, are admissible and properly admissible, and certainly, Mr. Smith cannot be an accomplice to himself.

He said first to Mr. Dankworth that he passed numerous false and forged Morrison-Knudsen checks. In fact, he didn't even know for sure where he cashed them all. In addition to that, of course, there was a positive identification made by Mrs. Shields and by Helen Burnett and identification that you will recall from Mr. Barton that he was in there and cashed one of those M-K checks, but didn't know for sure which one of those he cashed, and

that the checks, as you will look at them, Exhibits 1 thru 5, are made out in the name of Wendell Ware, and were signed in the name of Wendell Ware, and it's the testimony of the [275] witnesses that this man appeared before them and signed the name of Wendell Ware on the checks.

Now, briefly, in closing, I would suggest to your Honor that the true rule is not to entirely strip the case of the accomplice testimony here. The true rule is that if the testimony of the accomplice is corroborated in material respects, that that is sufficient to sustain a conviction and as authority for that, I would cite your Honor *Teague vs. the State*, found in 81 Pacific 2nd, at Page 331; *Dykes vs. the State* found in 1 Southern Reporter, 2nd, at Page 754; *People vs. Wilson*, 153 Pacific 2nd, Page 721 and *People vs. Whittaker* found in 63 Pacific 2nd, Page 1202. The Southern cases are from—one from Oklahoma. I'm not familiar with their statute. The second Southern case, the 1 Southern 2nd case is an Alabama case. That has a statute very, very similar to ours and the California cases are, of course, under Section 1111 of the California code, which is identical with ours.

I therefore, request the Court that since there is ample corroborative evidence on all defendants, that the motions be denied.

* * * * *

The Court: * * * Mr. Nesbett, I wouldn't want to hear from you. The motion to strike the testimony is denied. I am of the opinion that while, and I am not determining at this time that there may

have been or that it was, there may have been [276] some duress, coercion, against the Defendant Smith prior to the time that he was arraigned, I feel that that was overcome by the fact that he was arraigned not only in Seattle before the Commissioner there, at which time he was represented by counsel, and further, that he was represented by counsel on the following day; that in addition thereto, he came to Anchorage and was arraigned at Anchorage and that sufficient time had elapsed, that is, between the 18th and 19th of March, 1957, and the 27th day of March, as I recall the testimony of Mr. Dankworth was to afford this Defendant an opportunity to have chartered his course as to his future action in response to his guilt or innocence. Now, as I recall, the testimony of Mr. Dankworth was to the effect that he was inquiring of Smith concerning another crime and was not even discussing this crime when in truth and in fact, according to Dankworth, the Defendant Smith volunteered the statements; he wasn't even asked about it, so I don't know how you could indicate from the evidence before the Court at this time that there was duress, coercion, or that the continuing pressure by the law enforcement officers was still urged upon him in this case.

Now, having determined that, I feel that the Motion For a Judgment of Acquittal in the case of Smith is not warranted and therefore, deny the same at this time.

* * * * *

The Court: Now, the laws provide that the De-

fendant [277] must state his defense and may briefly state the evidence he expects to offer in support thereof. (Glancing thru the Session Laws) I think you are right, Mr. Hepp, it provides as follows, and I am reading from Chapter 45 (reading) "provided that after the United States has produced its evidence and presented its case in chief, the Defendant or his counsel, if he intends to produce evidence must then state his defense and may briefly state the evidence he expects to offer in support of it". Since you do not intend then to produce any evidence, it will not be necessary under the law * * * Mr. Nesbett.

Mr. Nesbett: I wrote out that section before I appeared in court, your Honor, because I anticipated that I might be called upon to state my defense before all the other Defendants had stated their defense and I don't agree with the law and I think it's unconstitutional in a trial of this kind and I will state at this time, however, that the Defendant Charles Smith does not wish to state his defense.

The Court: Do you intend to produce any evidence?

Mr. Nesbett: It will depend upon whether anyone else takes the stand; I don't know. You see, your Honor, the difficulty in applying the law to the trial of a case of this kind——

The Court: Well, the Court has ruled that since Mr. Hepp for his client Wright invoked the rule, he would have to call his witness first if he intends to call him at all. He has now apprised the Court that he does not have to, or doesn't [278] intend to put

on any evidence; therefore, he need not call, of course, Mr. Wright. Now, that eliminates one defendant. Now, we have only left then, Mr. Smith and Mr. Ing.

Mr. Nesbett: Yes.

The Court: What do you intend to do, Mr. Kay?

Mr. Kay: Well, in the first place, I have made my opening statement, so we are beyond that point, your Honor.

The Court: Yes.

Mr. Kay: I, frankly, had not anticipated the action of Mr. Hepp in resting his, as he has a perfect right to do, of course, relying upon his theory of the defense. I would like, your Honor, and I don't—I am sure that we can finish this case today, so I am not imposing on the Court or jury in any way if I ask for a brief recess at this time to confer with the Defendant James Ing and with Mr. Gore if we could have ten minutes or fifteen minutes for a conference here. Your Honor, I would then be in a position to state what I plan to do.

The Court: Well——

Mr. Kay: That is not an unreasonable request; I hope the Court will not feel that it is.

The Court: No objection unless other counsel have objection.

Mr. Plummer: The Government has no objection, your Honor.

The Court: Very well, then the Court will go into [279] recess for a period of ten minutes.

(Thereupon, following a short recess the fol-

lowing proceedings were had in the presence of the jury:)

The Court: Let the record show all the jurors are back and present in the box. Mr. Kay.

Mr. Kay: Your Honor, the Defendant James Ing, relying upon the motion previously made, your Honor, rests his defense at this time.

The Court: Very well. Mr. Nesbett.

Mr. Nesbett: Your Honor, the Defendant Smith does not desire to produce any witnesses and rests his case upon the motion.

The Court: Very well.

* * * * *

Mr. Nesbett: * * * * * I do recommend, however, Mr. Kay's suggestion that we do adjourn until two and at this time, I would, for the purpose of the record and in the presence of the jury, renew the Motion For a Judgment of Acquittal on behalf of the Defendant Smith.

* * * * *

(Thereupon, the U. S. Attorney was called upon to proceed with his Closing Argument (the last portion) to the Jury, and the following proceedings were had:)

Mr. Plummer: I, like everybody else, have a difficult task ahead of me, due to the fact that I have to answer argument [280] and statements made by four different people and if I do them individually, I will be repetitious and keep harping on the same thing all the time. If I try to answer them as a group, I am liable to miss a point and I don't know what to do for sure, but what I am going to try

to do is to group them together and in the areas where their defenses are common, their arguments are common, try to meet them as much as I can as a group rather than individually to cut down on the time and to cut down on the repetition.

Now, there has been a lot of talk about feeling sorry for the people this afternoon. Now, I have a duty and you have a duty to feel sorry not only for the defendants here on trial, but you have a duty to feel sorry for the merchants and people in business in this community. While we are feeling sorry for people let's don't forget about that duty.

Now, I think probably the first argument that I will attempt to cover is that, with the exception of Mr. Nesbett, who did not have the common defense with the other parties, the other defense attorneys made this appear as though actually it was a matter of law; it's not a matter of fact at all; it's a matter of law. Well, nothing will be further from the truth. You will get your law from the Court. It's a factual issue. If it was to be decided as a matter of law, I wouldn't be standing right here right now. You wouldn't be sitting there right now. The Judge would have decided it before this time; so, it's not as they would have you believe, a matter of law. It's a factual issue that you will [281] have to decide.

While we are talking along those lines, let's talk about this accomplice instruction just a little bit. Mr. Hepp dwelled on it at some length. Mr. Kay dwelled on it for some length and I think the impression that they left may well have been a little confusing to you jurors. They kept talking about

taking away from the case the testimony of Walker and taking away the testimony of Taylor and seeing what was left. Now, that is not the way it should be done. There is nothing further from the truth. The Judge in Instruction No. 6 will tell you what you are supposed to do in Instruction No. 6 and then follow that instruction very carefully and if what they said was the law, to quote Mr. Kay, I will eat Instruction No. 6, or the paper upon which it's written.

Now, there's been some talk about the Government's witnesses who would lead—maybe didn't convince these people sitting around this table, but let me point out to you the three witnesses they attacked. Taylor, think about the cross examination on Taylor. How much cross examination was there? Just how much was there? And what—in what respect did they bring up any false or any deviation in his cross examination? Not one. Not one. And I think it's very indicative of what they felt, what they really felt because the cross examination as you recall was very, very limited.

The next Government witness that was criticized was [282] John Walker. They tried to bring out discrepancies on cross examination, and I submit, they didn't bring out a one; not a one.

The third man, Brownfield. They paint what a criminal history he's got. I'm not here to defend Brownfield, but I ask you, where in their cross examination, where in their cross examination did they cross him up in any point? Tell me where?

Now, I'll digress for just a minute on Mr. Hepp's

statement that all Mr. Wright was, was—actually, he didn't do much; all he was, was a chauffeur, was all he was; just a chauffeur. Somebody gets paid for chauffeuring somebody over a weekend for \$6,000.00. Does that sound logical? Does that make sense? If they do, I am in the wrong business, and I think probably, you are in the wrong business, if you can make \$6,000.00 a week in just chauffeuring somebody around town. I think it would be a real good business to be in.

Now, there's also much innuendo about the reliability about the Government's evidence. I say, and you know, it's the only evidence you have. If they didn't feel that it was reliable, why didn't they put on some evidence? Why didn't they put some evidence on? You have no choice; you have no evidence or no testimony other than that adduced by the Government witnesses, and by the Government—

Mr. Kay: I hesitate to interrupt Mr. Plummer's argument, but I want to register an objection to that line of argument as tending to violate the constitutional right the defendant [283] may have.

The Court: Well,—

Mr. Plummer: I didn't mention anybody, except, why didn't they put on a defense.

The Court: That is correct. Objection overruled. If it had referred to an individual, then I would concur, Mr. Kay.

Mr. Kay: They refer to three individuals at this counsel table, and no one else.

The Court: Of course, that is true.

Mr. Plummer: I didn't say—may counsel approach the bench for just a moment?

The Court: I don't think it's necessary, counsel. Let's proceed.

Mr. Plummer: Fine. Now, also, I think it was Mr. Hepp that conceived the idea that Mr. Walker and Taylor got real mad at Mr. Wright so they made up a story about him. Now, isn't it funny and don't it strike you as a little odd that if Walker and Taylor made up the story about Wright and about this transaction, that Brownfield, who was down at McNeil Island during the whole time that his story dovetails in perfectly with what they say. They certainly didn't go down to McNeil Island and see him and he didn't leave McNeil Island to come up here and see them. It's just—I think it's just a little peculiar if that is what has happened, that the two just dovetailed in just like hand in glove, corroborate each other right down the line. [284]

There was also a reference, I think, made by Mr. Hepp as to the fact that how foolish it was—how foolish it was to have three fires out there. Why didn't they just build one big bonfire, and why did they destroy the stuff at all? Well, I will tell you why they destroyed the stuff. They wanted to get rid of that identification and those checks before they got caught and the surest way to get rid of it was to burn it. We are not dealing with any school children here, and the reason they burned it separately was so they would not be called into a court of law, supposedly, some day to testify as to what each other burned. If they wanted to, they could

testify as to what they burned themselves, but not to what the other party burned. We are having an example of that right here in this trial.

Now, I'll next pass to the proposition supported chiefly by Mr. Kay that Mr. Brownfield is an accomplice to this operation down in Anchorage. Now, nothing could be further from the truth. He was engaged in a similar operation up at Fairbanks. He had nothing to do—he had nothing to do, and could not be charged with the operation down in Anchorage. The fact that he might have been charged with a separate crime or, with a different crime certainly does not make him an accomplice and you will be so instructed by the Court.

Now, the charge in this case is not interstate transportation or false securities or forged securities; it's not the forging of securities. It's the uttering and publishing of [285] specified securities, twenty in number, in the Anchorage area over the Labor Day weekend. There is no way that he can be an accomplice in that transaction.

Now, there was at least innuendo, I presume is as good a way to put it as any, that at the time Mr. Chenoweth, or Mr. Harkabus went down to see Mr. Brownfield down at McNeil, they made him promises of some kind. Well, Mr. Brownfield denied it from the stand, but that Mr. Kay was not satisfied, for if anybody was not satisfied with the answer that Mr. Brownfield gave, they could sit there and subpoena Mr. Jim Chenoweth, have him testify under oath as to what was said down there, and I am sure they will find Mr. Chenoweth is not a three-

time loser, and the same way with Mr. Harkabus, former Special Agent with the F.B.I. They could have subpoenaed him. He's here in town, available. If they wasn't satisfied with the answer that Brownfield gave, this other proof was readily available to them, if they would have just used it. Why they didn't, I don't know, but since they didn't, they're going to have to be satisfied with the answer that Brownfield gave because that is the only answer there is in front of you. That is the only answer you have.

Now, next, addressing to—my remarks to Mr. Kay's assumption that, I guess again by innuendo, that we should have arrested everybody that stayed down at the Westward Inn that night. Well, let me point out a few differences between the Defendant Ing and the other people that stayed down at the Westward Inn [286] that day. The first difference is that the Defendant Ing received a phone call or two from Wright and Wright went down to the Westward Inn and came back with some checks, the Morrison-Knudsen checks, the false I.D. cards; and next, Mr. Volk went down to the Westward Inn and came back a short while later with some false I.D. cards and some phony Morrison-Knudsen checks; and I will go along with Mr. Kay to this extent, anybody who was staying there under those circumstances, should have been arrested and the only person, of course, there was, Mr. Ing. He was arrested.

Another thing, Mr. Kay, of course, is a—has been very active in the Legislature. He—as the remark

was made in court this morning, that he—the amendment that your Honor was looking for was—Mr. Hepp was going to make, either make a statement, or, not make a statement, I think he was in the Legislature when that was passed. He had been very active in the Legislature. You will note that on the Exhibit you have the pink identification card. May I see it for just a minute, the pink driver's license (talking to the In-Court-Deputy); the date on the license was 1952. Now, Mr. Kay knows, because he was in the Legislature at that time that at that time the Department of Taxation handled driver's licenses. Now, the Department of Territorial Police handles the licenses and the records are no longer available. They never were available to the Territorial Police.

Mr. Kay: I must object to that, your Honor, and ask [287] that that be stricken. That is an improper argument. There is no argument—evidence, whatever, of that fact.

The Court: Objection sustained.

Mr. Kay: And the jury be admonished.

The Court: Well, the Court instructs the jurors not to consider the statement made by Mr. Plummer in that regard.

Mr. Plummer: Only the last statement, is that correct?

The Court: Yes, that is correct, since there isn't any evidence before the Court as to whether the records have been, or, are not available——

Mr. Plummer: Yes, sir, I wish to apologize.

The Court: Are not now available.

Mr. Plummer: Further, in regard to the—I don't mean testimony, but the argument of Mr. Kay, he told you people that there was not one word to connect the Defendant Ing with these checks. I don't understand his statement. He certainly was here when Mr. Brownfield testified. I don't understand the statement, but if I recall him correctly, that is the statement he made. Also, he was sitting here in court, I believe, when George Hooker was on the stand and George said that Ing was staying down there. I think Wendell was in the courtroom, I hope he was, anyway, at the time that Mr. Dankworth was on the stand and told about the admissions made by the Defendant Smith of having Volk go up to the hotel where he was staying, up at the Westward Inn—I'm sorry—and picking up the checks and I think he was also [288] here in the courtroom when they were telling about Mr. Wright also going up to the Westward Inn and coming back with some checks. So, I am, if I understood Mr. Kay correctly, and I think I did, because I think he said it quite emphatically, I am at a little loss to explain or to understand his statement.

Now, further, in regard to an assertion made by Mr. Kay which is, and in fact, the same assertion made by Mr. Hepp when he first started to argue, is that the Defendants in this case would have to be proved guilty without a reasonable doubt, beyond a reasonable doubt by the corroborative evidence alone; he is going to try and kill an elephant with a grain of sand. That is not the law and that's not the Court's instructions. The Court's instructions is

that all the evidence taken together will convict him; not one little parcel here, or an isolated parcel there. It's the sum total of all the evidence, as the Court will instruct you in Count No. 6.

I think that I probably covered this just slightly. I refer now to the things that Mr. Kay referred to as "neutral facts". All the corroborative evidence was neutral facts—twenty checks that were seen up in Fairbanks, were next negotiated down here—that is a neutral fact? The fact that Mr. Ing stayed up in the hotel at the Westward Inn, that is a neutral fact? The fact that Volk went down there and got checks, that is a neutral fact? The fact that Wright went down there and got checks, that is a neutral fact? The fact that he took this picture, [289] is that a neutral fact? The fact that he gave this man this driver's license, is that a neutral fact? If they're neutral, I am real surprised. If they're neutral, I don't know the meaning of the word "neutral".

Now, jumping to Mr. Gore's speech for—or argument—for just a minute, he mentioned that it would be very, very foolish, he seemed to think, for Brownfield to accept this package at the tavern there in Chicago. I don't see why that is foolish because that is precisely what he, the Defendant Ing, arranged for. There is nothing foolish about that. If you are doing business with somebody, and he says somebody is going to come by there and leave you a bundle, you take the bundle.

One other brief mention that is not important, and I probably shouldn't delay on the matter, ex-

cept that I believe Mr. Gore misquoted the law somewhat, that I think, that the penalty on the habitual, the maximum is life. I don't think there is any minimum. It can be suspended; it can be done, anything. It doesn't make any difference. He made quite a story about Mr. Walker, attempting to attack his credibility. They never shook him on the stand one iota. They, in so far as I could see, they did get him to say, although he quit gambling, that he actually was a dealer in some cardhouse that they have up in Fairbanks. Well, you people that are gamblers, or, not gamblers, but you people that know more about it than myself, probably know more about it than I do, but I am under the impression if you are a dealer, [290] you can't gamble. You're in there; you take a cut for the house; you don't sit in there and beat and gamble. That, also, is unimportant.

Now, there is also—mention was made, I think, by Mr. Gore, that you must be able to say, of course, in answer to your conscience, that you have done your duty to these defendants. Well, in addition to that, in answer to your conscience, you must be able to say that you have done your duty to your country and to the community in which you live; and on the evidence, on the evidence, it's clear where your duty lies. There is no evidence except that presented by the Government and it's not been refuted; it's not been refuted; not one word of it. Now, if they wanted both Williamson, anybody like that, to testify, Mr. Chenoweth, Mr. Harkabus, or anybody, they could have had them testify. It

would have been just as simple as going to the Clerk's Office and getting a subpoena; just that simple.

Now, we jump to Mr. Nesbett's mention about the Defendant Smith. If I would have been on the stand in place of Mrs. Shields—Mrs. Shields, Virginia Shields—and I would have been asked about a conversation with Mrs. Shields, I would have said “No,” because she had not had a conversation with me and that was the question: Have you had a conversation with the United States Attorney? She said “no”. Later, it developed that she had had a conversation with some other police officers, but that wasn't the question that she answered “no” to.

Now,—and let me—much has been said about Helen Burnett, also, and her being so positive and being so anxious to help out the Government. Let me point out that both Virginia Shields and Helen Burnett, under oath, when asked by me on redirect, I asked them if there was any doubt, if they were positive in their mind that this was the man, at that time pointed to Mr. Smith; they said, “none at all. That's him.”.

Now, I noticed when Mr. Nesbett was up here, he mentioned about having a transcript of the testimony and he waved a piece of paper around, but he never read what the testimony was. As I recall, his recollection of the testimony on Shields and Mrs. Burnett was about the same as my recollection, but at that point, we part when we get talking about Mr. Barton, from the Union Club. It's my recollection of the testimony of Mr. Barton's testimony,

that he said he did recognize Smith and he did recall that he cashed an M-K check there on that weekend, but what he couldn't do, he had three bogus checks, and he couldn't pin this Defendant Smith down to any one of those three checks, which was the question asked to him, but he did say that he was in there and cashed one of those bogus M-K checks and, of course, you know from his own admissions to Officer Dankworth, that the one he cashed was the one made out to Wendell Ware and endorsed by Wendell Ware, and he—you also know that if there was a check passed at the Hub Clothing Company made out to Wendell Ware, that by his own admission, he is guilty of passing that in spite of the fact [292] that Mr. Futor couldn't remember him. By his own admissions, he is charged, or, I will say this: he is charged with five counts in the indictment; by his own admission he cashed thirteen to fifteen checks.

Now, there was some comment by Mr. Nesbett about the vagueness of the testimony of Mr. Dankworth. Well, let me point out to you people what you no doubt have already guessed and know—you are probably ahead of me. He was testifying as to what Smith told him. He couldn't make up facts. If Smith was vague when he told him, the only thing he could do was repeat what Smith said. He couldn't fill in and make up facts of his own. He was limited to the admissions made by the Defendant Smith.

Now, let me bore you just one more time on the subject of corroboration. You have heard it until

you are probably sick of it, but let me impress it on you just one more time, if I may, and I will be brief. It's my contention, and I am sure that you will agree, that the testimony of the accomplices, and there were only two accomplices, Walker and Taylor, have been amply corroborated. In fact, there has been nothing to disprove the truth of every statement they have made; not a thing. Now, in regard to Smith, of course, it's not a problem with Smith because there was no accomplice testimony concerning him, as Mr. Nesbett so ably pointed out.

Now, to go to the Defendant Wright in the way of corroboration. There is the testimony of Eli Williams, placing [293] him in town that weekend, staying at Eli Williams' house. There is the testimony of Yokely that he saw Wright, Williams and Taylor together at Williams' house. There is also the very important and very telling incident on February 12th, out at the Club Oasis, where the Defendant Wright made threats against the witness Taylor to try to prevent him from testifying. All right, in addition to that, there's the physical evidence of the checks. You will have them there in front of you up in the juryroom, that he gave to Taylor and Walker, made out in the names that they said they were made out in, endorsed in the name that they said they were endorsed out in, and deposited with identification to these thirteen or fourteen people we had in here to testify that they were the people that were there passing as James

Wood in the first place and as Thomas Brown in the second place, the same two people that were here in this courtroom.

As to the Defendant Ing, there is the corroboration of the testimony of Mr. Hooker in the hotel rooms. There is the false identification with the picture that he took of Mr. Brownfield still on the I. D. There is a driver's license and I ask you when you get up there, look at it closely, look at the top line, and you will see a writing underneath that appears, at least to me, to be James Ing. Underneath the Charles Lappa, which the Ing has been written out, erased out, and Lappa written overneath it; and, last, but not least, there are the—all the checks in this case, Exhibit 1 through 19 and 21 which were given to the [294] Defendant Ing in Fairbanks, ended up down here, being negotiated to the merchants here in town.

Now, let me recall, if you will, when the trial concluded somewhat earlier this morning than at least I anticipated, at that time, Mr. Hepp, representing the defense of Raymond Wright, merely advised the Court that he would rest the defense of Raymond Wright at this time. Mr. Kay, representing the Defendant Ing, did likewise, and rested his defense at that time. Those were his words. Mr. Nesbett, who is representing the Defendant Smith, stated he did not desire to produce any witnesses and rested his case upon the motions. The last thing—now, let me retract that. There is not one shred—there is not one shred of evidence produced in this case for you folks to consider, except the

evidence adduced by the Government, and I feel that it is overwhelming, and I think you must too.

In closing, I want to thank you people for your kind attention to the evidence during the trial. It's been a long trial and it's been because of the number of parties involved and the number of attorneys involved. It's been difficult to follow and not too exciting. Now, I want to thank you for your kind attention during the presentation of the evidence. As I said before, it's been a long trial and a hard trial, but before the matter ever got to the trial stage, police officers did work long and they worked hard, and they have done their duty. The Grand Jury considered the evidence and they did their duty. [295]

Mr. Nesbett: I will object to any argument along such lines, your Honor. That has nothing to do with the issues in this case. There is nothing in evidence as to what the Grand Jury did, or did not do. It's improper and I object.

The Court: Objection sustained, Mr. Plummer.

Mr. Plummer: Very good. Do you wish to tell the jury to disregard my last remark?

The Court: I haven't been requested to.

Mr. Plummer: All right. The merchants who were defrauded in this swindle have taken their time away from their business and come to this court to act as witnesses. They have done their duty. The Court has been very patient and conducted a fair and impartial trial and has done its duty. I presented the evidence as best I can and I have done my duty. I now request that you do your

duty and convict these defendants. Thank you.

The Court: Very well, Mr. Plummer. Counsel may come to the bench and take exceptions, if any they have to the instructions prepared by the Court.

* * * * *

United States of America,
Territory of Alaska—ss.

I, Iris L. Stafford, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcript of excerpt of proceedings on the trial of the above-entitled action, taken by me in stenograph in open court at Anchorage, Alaska, on February 18, 19, and 20, 1958, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD.

United States of America,
Territory of Alaska—ss.

I, Bonnie T. Brick, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcript of excerpt of proceedings on the trial of the above-entitled action, taken by me in stenograph in open court at Anchorage, Alaska, on February 24, 25, 26, and 27, 1958, and thereafter transcribed by me.

/s/ BONNIE T. BRICK.

[Endorsed]: Filed May 16, 1958. [297]

[Endorsed]: No. 16041. United States Court of Appeals for the Ninth Circuit. Charles E. Smith, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed: May 23, 1958.

Docketed: June 12, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16041

CHARLES E. SMITH, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

ADOPTION OF STATEMENT OF POINTS

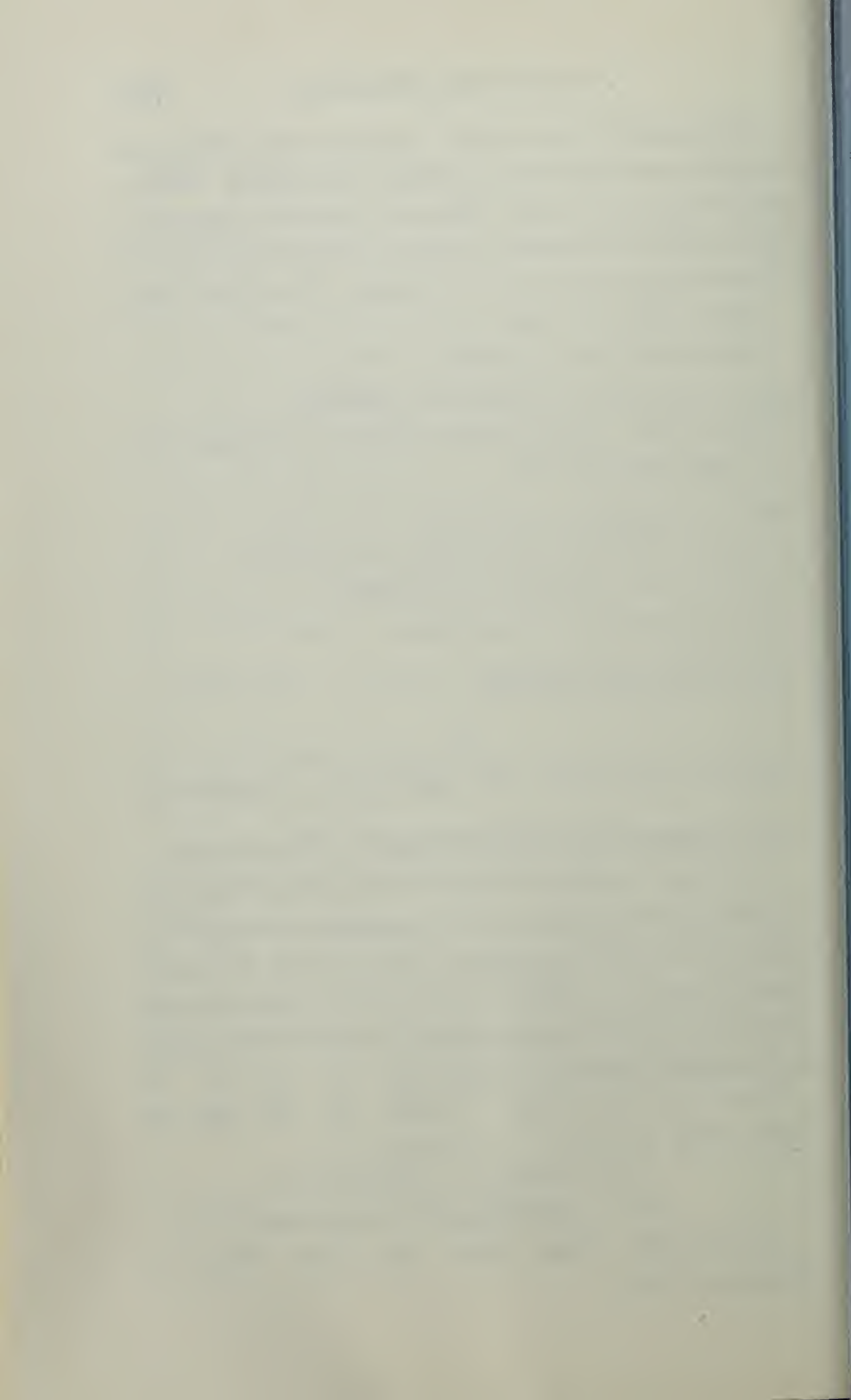
Appellant herein, through his attorney, Buell A. Nesbett, hereby adopts the typewritten statement of points on appeal heretofore filed in this case and dated March 11, 1958. A typewritten copy of such statement of points on appeal is enclosed herewith and attached to this adoption.

Dated at Anchorage, Alaska, this 9th day of June, 1958.

/s/ BUELL A. NESBETT,

Attorney for Appellant.

[Endorsed]: Filed June 13, 1958. Paul P. O'Brien, Clerk.



No. 16041

United States
Court of Appeals
for the Ninth Circuit

CHARLES E. SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Supplemental
Transcript of Record

Appeal from the District Court
for the Territory of Alaska
Third Division

FILED

OCT 23 1958



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CHARLES E. SMITH,

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UNITED STATES OF AMERICA,

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**Supplemental
Transcript of Record**

**Appeal from the District Court
for the Territory of Alaska
Third Division**

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PLAINTIFF'S EXHIBIT No. 20
(For Identification)

I, Charles Edward Smith, residing at 11815 78th Avenue South, Seattle, Washington, hereby make the following voluntary signed statement to Special Deputy, United States Marshal Ted Pass, and Lt. Wm. W. Trafton, Dept. of Territorial Police. I have been advised of my right to counsel, that I need not make a statement and any statement that I do make may be used against me in a court of law. No threats or promises, or any form of duress have been used to induce me to make this statement.

Sometime during the last week in August, 1956, while I was working at the International Hotel, Fairbanks, Alaska, operated by Lou Kinda, John Volk, who resided at the International Hotel, asked me if I wanted to make some money. He told me that it involved a check passing scheme. I told him that I was interested. About August 28, 1956, John Volk mentioned to me that this deal had to do with the passing of the M-K checks. I asked him how much was involved and he told me about \$100,000.00. I believe it was at this time he asked me if I was known in Anchorage. I told him no so he said it was all set. I mentioned to Sam Leacock, operator of several B-Girl joints, that he should not accept any M-K checks as he would get stuck.

On August 31, 1956, while I was working at the International Hotel, John Volk told me to come to his room, which I did. In his room, John Volk took

a picture of me and I in turn took a picture of him, with a Polaroid camera. Also at this time, Volk showed me an identification card made out in the name of Wendell R. Ware. I believe that I signed this card at this time, with the name Wendell R. Ware. I did not see this card again until Volk and I were in Anchorage.

Before we left Fairbanks, Volk informed there was no hurry in getting to Anchorage because we were supposed to get there after the banks were closed. He told me we had three days in which to pass the fraudulent M-K checks.

John Volk and I left Fairbanks early Saturday morning, September 1, 1956, in my 1956 GMC pickup, for Anchorage. I didn't have any checks and I do not believe Volk had any at this time. When we arrived in Anchorage, I left Volk out at the Westward Inn, located on the corner of Fifth and Gamble. I drove West on Fifth Avenue and stopped at the first bar on the right side of the street. I went into the bar there and waited for John Volk for about an hour. Volk walked from the Westward Inn, where I had dropped him, to the bar where I was waiting. When he entered the bar he was carrying a blue zipper bag. We went to the truck, where we opened the bag. It contained two bundles wrapped in newspapers. Inside the wrappings of each bundle were about fifty of the M-K checks, plus the identification card I had signed in Fairbanks in the name of Wendell R. Ware. This

identification card also had my photograph pasted on it. I also observed John Volk's identification card made out in the name of Michael L. Stevens, with the photograph that I had taken of him pasted on it.

I asked John Volk where he received the checks and from whom. Volk told me that I was getting nose-y and if I didn't know I couldn't tell. I feel sure that John Volk picked up the checks at the Westward Inn.

Prior to the time I began cashing these checks, I purchased a hat and a pair of glasses. The hat was one of the cheaper type hats, light brown or sun-tan in color. I wore these two items all the time that I was cashing the checks. I purchased them for the purpose of disguising my identity.

I estimate that I cashed about thirteen of the M-K checks, endorsing each check with the name of Wendell R. Ware as it was cashed. John Volk and I cashed several checks in the same store at the same time. I also observed John Volk endorse several of the M-K checks with the name of Michael L. Stevens. Some of the places that I remember cashing some of the M-K checks are as follows:

Northern Commercial Company

Union Club

Market Basket, Spenard

J. Vic Brown Jewelry

Club Bar

Paddock's Paint Store

Piggly Wiggly (2 Stores)

Fruit Stand (5th & Gamble)

There were other stores also, but I cannot remember the names or the locations.

During the time that I was passing the checks, I observed Alice Bramlett and Lee Williams with another man in a late model automobile. Lee Williams was driving. The reason I recall this is that I didn't want anyone that I knew to see me, and I sort of hid myself from them.

I made arrangements with John Volk to meet me in front of the Fourth Avenue Theater where I had gone to see a show. He told me that we had plenty of time to cash the checks. I took my pickup to a gas station for a grease job and oil change. This station is located quite a distance from the theater. When I came out of the show John Volk met me and told me that we had to leave for Fairbanks right away as there was some trouble up there. I caught a Yellow Cab and drove to the gas station where I got my pickup and then picked up John Volk. We left immediately for Fairbanks. I estimate we were in Anchorage for only four hours. I estimate that when we left Anchorage we had about \$5,000.00 in cash in small bills, which we put in a brown paper bag. I believe that John Volk passed about the same number of checks as I did.

Shortly after we passed the military camp on the Glenn Highway, we pulled off into a side road and

threw away all the merchandise that we had purchased in Anchorage. We also burned the balance of the M-K checks and our identification cards. All we kept were some carrots that we had bought, and several bottles of whiskey, VO brand.

At this same time, I also threw away the hat and the glasses that I had purchased in Anchorage.

I estimate that we left Anchorage about 6:00 p.m., on September 1, 1956, and arrived in Fairbanks about 3:00 a.m. the following morning. We stopped in the Diamond Horseshoe Bar, which was still open. John Volk then dropped me off at 1001 First Avenue. He told me to get packed, that he would be back in about one-half hour and we would then leave for the border. Volk said that he had to take the money out to the Country Club. This was the last time that I saw the money, but I heard later that it had been used as bail money to help get Brownfield, Eckley and Hausam out of jail.

John Volk and I cleared the border on September 2, 1956, and arrived in Seattle on Tuesday, September 4, 1956. I drove all the way. I didn't get any sleep for three and one-half days. Volk and I checked in to the Alvord Hotel, located at 914 Pike Street. We stayed there several days and Volk left and I went to my parents' place at 11815 78th Avenue South. I have not seen Volk since but I had a long distance call from him from Peoria, Illinois, and he informed me that Cliff Judd had the check money that was part of the \$30,000.00 bond for the

three check passers who were arrested in Fairbanks. This call came to me about a week after Volk left Seattle. I then began to go out to the Seattle-Tacoma airport to see if I could spot Cliff Judd coming down from Alaska. Volk had informed me that Cliff Judd had left Fairbanks. About this time I contacted Johnny Boyd, operator of the Greenland Bar, as I knew he was a good friend of Cliff Judd. Boyd told me he did not know where Judd was at the time. However, later Boyd told me that Judd had called him from Vancouver, B. C. At one time that I was in the Greenland Bar, James Ing was with me. James Ing was also looking for Cliff Judd. James Ing told me that Cliff Judd had the \$30,000.00, and he was going to get it back.

I happened to run into Judd at the International Airport. James Ing was with me. Big Foot, whose name is Don Urlin, drove out with me in the Cadillac owned by Tom Pulakis, who lives at 107 Eastlake Avenue. Urlin stayed in the car. Both Ing and I asked Judd about the \$30,000.00. Judd denied having the money, but said that if he did have it he would not give it back.

A few weeks later I made a trip to Chicago and Peoria, Illinois, in an effort to locate John Volk. I intended to go to South America and thought he would want to go there also. I could not locate Volk but heard that he had been there. I talked to Kenneth R. Brownfield in Chicago and told him that I had been in Anchorage with Volk and had passed M-K checks there. Brownfield didn't know where

Volk was. I had known that Volk and Brownfield had been in jail together. I returned to Seattle in about five days and then returned to Fairbanks via Pan American.

I only stayed a few days in Fairbanks as everyone told me I had better leave. While in Fairbanks, Lou Kinda informed me that John Volk had sent him a wire from Miami, Florida.

Sometime during February, 1957, I met James Ing in the New Washington Hotel in Seattle and told him that I might be going to Fairbanks to get a job. James Ing told me I would be crazy if I returned to Alaska.

On Friday, March 15, 1957, at about three o'clock in the afternoon, I was picked up at my home by Lt. Wieland, King County Sheriff's Office, and Special Deputy U. S. Marshal Ted Pass, who held a warrant for my arrest. I was taken to the King County Sheriff's Office in Seattle, where I signed a waiver of extradition for my return to Alaska.

I have furnished the content of this statement to Special Deputy U. S. Marshal Ted Pass and Lt. Wm. Trafton, Department of Territorial Police. I have read this statement in its entirety, consisting of four typewritten pages. It has been read to me and I have been allowed to make any corrections or deletions that I desired. I have signed each page with my signature. To the best of my knowledge and recollection, the facts contained herein are true.

/s/ CHARLES E. SMITH

Witnessed By:

/s/ WM. TRAFTON,

/s/ T. E. PASS,

/s/ EDWARD J. HARKABUS

PLAINTIFF'S EXHIBIT No. 23
(For Identification)

United States Commissioner, District of Alaska,
Anchorage Precinct, Anchorage, Alaska

No. 45-64

UNITED STATES OF AMERICA,

vs.

CHARLES EDWARD SMITH.

1957

Mar. 14—Complaint filed in writing on oath of William T. Plummer, United States Attorney, charging the defendant with the violation of Section 65-6-2 ACLA 1949. Forging and uttering a forged instrument.

Mar. 14—Warrants issued.

Mar. 21—Defendant appeared without counsel before Warren C. Colver, complaint read,

advised of his rights and defendant waived his right to a Preliminary Hearing.

Commitment issued and bail set at \$10,000.00.

Mar. 22—Transcript of Proceeding sent to the District Court. This is to certify, that herein are all the original papers and pleadings in the above-mentioned case.

1. Complaint.
2. Waiver.
3. Commitment.

[Seal] /s/ WARREN C. COLVER,
United States Commissioner.

This will acknowledge the receipt of all the original papers and pleadings in the above-mentioned case.

Dated at Anchorage, Alaska, this 22nd day of March, 1957.

/s/ ROSEMARY RICE,
Deputy Clerk of Court.

District Court for the District of Alaska, Third
Division, Anchorage Precinct at Anchorage

Commissioner's No. 45-64

UNITED STATES OF AMERICA,

vs.

CHARLES EDWARD SMITH.

COMPLAINT—FELONY

Charles Edward Smith is accused by William T. Plummer, United States Attorney, in this complaint, of the crime of 65-6-2 ACLA 1949 Forging and uttering a forged instrument, a felony, in violation of Section 65-6-2 ACLA 1949, which said offense was committed as follows, to wit:

The Said Charles Edward Smith, in the Territory of Alaska and within the jurisdiction of the District Court for the District of Alaska, wilfully, feloniously and unlawfully, on or about the 1st day of September, 1956, at or near Anchorage, Third Division, Territory of Alaska, did utter and publish as true and genuine, a forged and counterfeit payroll check of the Morrison & Knudsen Company Check No. 8847 dated August 29, 1956, drawn on the First National Bank of Anchorage, for the sum of Two Hundred Fourteen and 36/100 (\$214.36) Dollars payable to the order of Michael L. Stevens, and signed by the Morrison Knudsen Company by Guy M. King, with intent thereby to injure and defraud

the Anchorage Jewelers contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

/s/ WILLIAM T. PLUMMER,
Complainant.

Verification

United States of America
Territory of Alaska—ss.

I, William T. Plummer, United States Attorney, being first duly sworn, depose and say that the foregoing complaint is true.

/s/ WILLIAM T. PLUMMER,
Complainant.

Subscribed and sworn to before me this 14th day of March, 1957.

[Seal] /s/ WARREN C. COLVER,
United States Commissioner,
at Anchorage, Alaska.

Bail \$10,000.00

The first of these was the discovery of gold in California in 1848. This led to a great influx of people to the West, and the discovery of gold in Nevada in 1859 led to a similar influx. The discovery of gold in Colorado in 1858 and in Idaho in 1860 also led to a great influx of people to the West.

The second of these was the discovery of silver in Colorado in 1859. This led to a great influx of people to the West, and the discovery of silver in Idaho in 1860 also led to a similar influx.

The third of these was the discovery of copper in Arizona in 1851. This led to a great influx of people to the West, and the discovery of copper in Nevada in 1859 also led to a similar influx.

The fourth of these was the discovery of iron in Colorado in 1859. This led to a great influx of people to the West, and the discovery of iron in Idaho in 1860 also led to a similar influx.

The fifth of these was the discovery of lead in Colorado in 1859. This led to a great influx of people to the West, and the discovery of lead in Idaho in 1860 also led to a similar influx.

The sixth of these was the discovery of zinc in Colorado in 1859. This led to a great influx of people to the West, and the discovery of zinc in Idaho in 1860 also led to a similar influx.

The seventh of these was the discovery of nickel in Colorado in 1859. This led to a great influx of people to the West, and the discovery of nickel in Idaho in 1860 also led to a similar influx.

The eighth of these was the discovery of cobalt in Colorado in 1859. This led to a great influx of people to the West, and the discovery of cobalt in Idaho in 1860 also led to a similar influx.

The ninth of these was the discovery of manganese in Colorado in 1859. This led to a great influx of people to the West, and the discovery of manganese in Idaho in 1860 also led to a similar influx.

The tenth of these was the discovery of chromium in Colorado in 1859. This led to a great influx of people to the West, and the discovery of chromium in Idaho in 1860 also led to a similar influx.

The eleventh of these was the discovery of vanadium in Colorado in 1859. This led to a great influx of people to the West, and the discovery of vanadium in Idaho in 1860 also led to a similar influx.

The twelfth of these was the discovery of niobium in Colorado in 1859. This led to a great influx of people to the West, and the discovery of niobium in Idaho in 1860 also led to a similar influx.

The thirteenth of these was the discovery of tantalum in Colorado in 1859. This led to a great influx of people to the West, and the discovery of tantalum in Idaho in 1860 also led to a similar influx.

The fourteenth of these was the discovery of tin in Colorado in 1859. This led to a great influx of people to the West, and the discovery of tin in Idaho in 1860 also led to a similar influx.

No. 16041

United States
Court of Appeals
for the Ninth Circuit

CHARLES E. SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Second Supplemental
Transcript of Record

Appeal from the District Court
for the District of Alaska
Third Division

FILED

DEC 19 1958

PAUL P. O'BRIEN, CLERK



No. 16041

**United States
Court of Appeals**
for the Ninth Circuit

CHARLES E. SMITH,

Appellant,

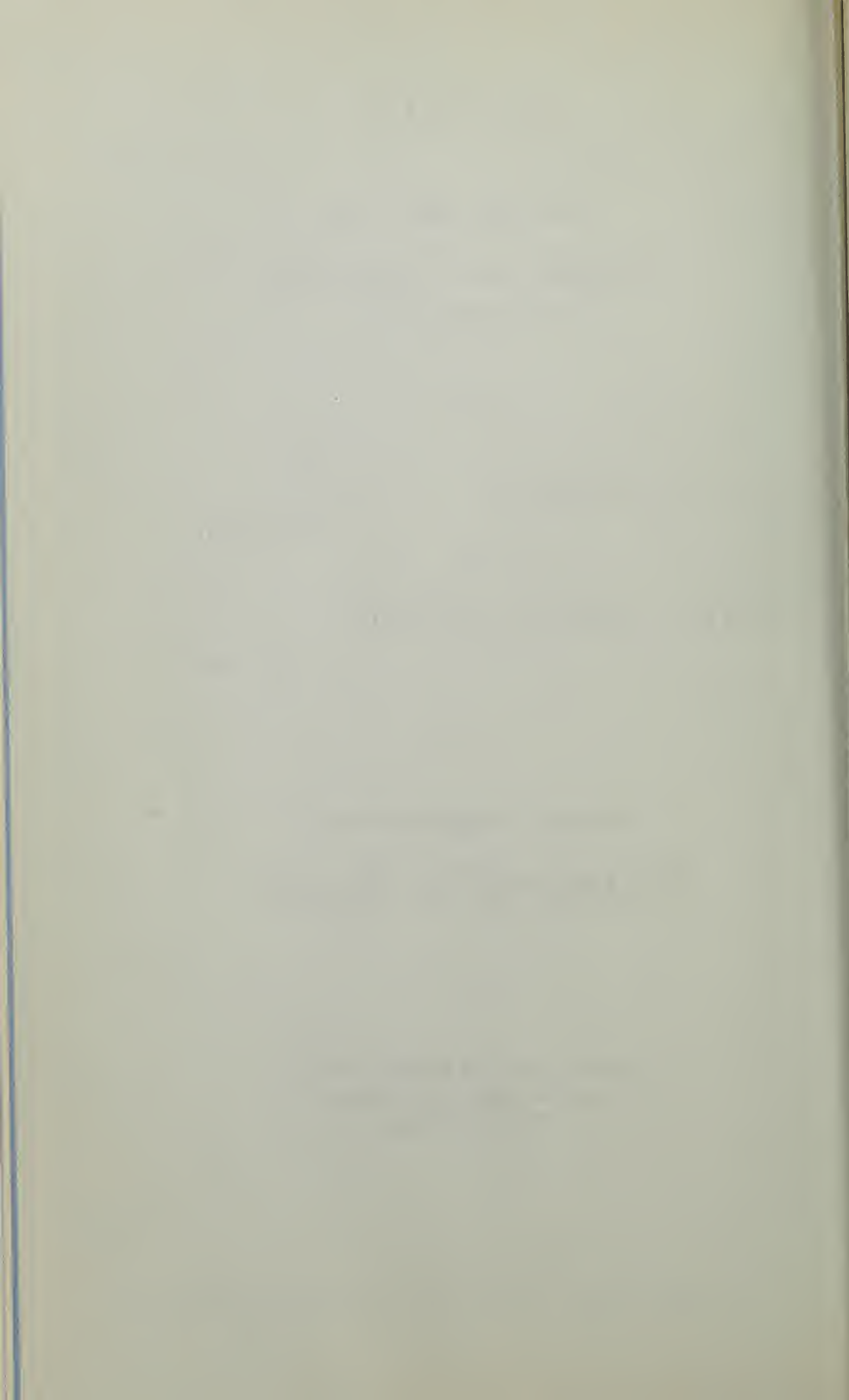
vs.

UNITED STATES OF AMERICA,

Appellee.

**Second Supplemental
Transcript of Record**

**Appeal from the District Court
for the District of Alaska,
Third Division**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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(2000)

The following table shows the results of the survey conducted in the year 2000. The data is presented in a tabular form, with the first column representing the different categories of the survey, and the subsequent columns representing the corresponding values. The total number of respondents for each category is also indicated.

Category	Value 1	Value 2	Value 3	Value 4	Total
1. General Information	10	20	30	40	100
2. Demographic Data	15	25	35	45	120
3. Attitudes and Opinions	20	30	40	50	140
4. Behavioral Patterns	25	35	45	55	160
5. Socio-economic Factors	30	40	50	60	180

United States Commissioner, Western District
of Washington, Northern Division

RECORD OF PROCEEDINGS
IN CRIMINAL CASES

Before John A. Burns, Commissioner.

Commissioner's Docket No. 5, Case No. 499

THE UNITED STATES

vs.

CHARLES EDWARD SMITH

Complaint filed on March 14, 1957, by William T. Plummer, Official title U. S. Attorney, charging violation of United States Code, Title 65-6-2 ACLA, Section 1949, on September 1, 1956, at Anchorage, in the Third division of the Territory of Alaska, as follows: Did utter and publish as true a forged payroll check in the amount of \$214.36.

Warrants or Summons Issued:

Date March 14, 1957.

Warrant for Charles Edward Smith.

To: U. S. Marshall, Dist. of Alaska, 3rd Div.,
any of his deputies, or other qualified officer.

Substance of return: Arrested at Seattle,
Washington, on March 15, 1957.

Proceedings on First Presentation of Accused to
Commissioner:

Date March 18, 1957.

Arrested by T. E. Pass, Sp. Deputy, U. S. Marshal, on warrant of U. S. Commissioner, 3rd Div., Alaska.

Appearances

For United States: None.

For accused: Richard D. Harris, 304 Spring St., Seattle, Wash.

Proceedings taken:

The defendant appeared before me with counsel and the charge in the complaint was read and explained to him. It appeared that defendant had previously signed a waiver of extradition which he and his counsel retracted at the hearing. Proceedings continued at request of defendant's counsel.

On March 19, 1957, the defendant again appeared before me with counsel and withdrew his revocation of waiver previously signed, and stated that he was ready to proceed to Alaska with the arresting officer.

Outcome:

Released to Alaskan authorities.

Bail fixed March 18, 1957.

Amount: \$10,000.00.

Bonded: No.

Committed to King County Jail on March 18, 1957.

Certified to be a correct transcript.

Made this 22nd day of March, 1957.

Transmitted to Clerk of United States District
Court March 27, 1957.

[Seal] /s/ JOHN A. BURNS,
United States Commissioner.

[Endorsed]: Filed April 8, 1957.

Second Supplemental Transcript of Record start
folios at 299. 1st part is set P.U

In the District Court for the Territory of Alaska,
Third Division

No. 3772 Cr.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES BURTON ING, RAYMOND WRIGHT,
and CHARLES E. SMITH,
Defendants.

INSTRUCTIONS TO THE JURY

Ladies and Gentlemen of the Jury:

It now becomes the duty of the Court to instruct
you as to the law that will govern you in your
deliberations upon and disposition of this case.
When you were accepted as jurors, you obligated
yourselves by oath to try well and truly the matters
at issue between the plaintiff and the defendant in
this case, and a true verdict render according to the
law and evidence as given you on the trial. That

oath means that you are not to be swayed by passion, sympathy or prejudice, but that your verdict should be the result of your careful consideration of all the evidence in the case. It is equally your duty to accept and follow the law as given to you in the instructions of the Court, even though you may think that the law should be otherwise. It is the exclusive province of the jury to determine the facts in the case, applying thereto the law as declared to you by the Court in these instructions, and your decision thereon as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore, the greater ultimate responsibility in the trial of the case rests upon you because you are the triers of the facts.

1.

By the indictment in this case, the defendants have been charged with the crime of "Uttering a Forged Instrument."

Count I of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully and feloniously, with intent to injure and defraud C. A. Peters, owner of the Fifth Avenue Cash Grocery, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count II of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware did wilfully, unlawfully, and feloniously with intent to injure and defraud the Kennedy Hardware, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, the owners of a certain business enterprise, the Sport Shop, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count III of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and Charles E. Smith, aka Wendell R. Ware, did wilfully, unlawfully and feloniously, with intent to injure and defraud the Hub Clothing Company, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count IV of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and Charles E. Smith, aka Wendell R. Ware did wilfully, unlawfully and feloniously with

intent to injure and defraud the Union Club of Anchorage, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware well knowing at the time that the check was false and forged.

Count V of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and Charles E. Smith aka Wendell R. Ware, did wilfully, unlawfully and feloniously, with intent to injure and defraud Wallace Burnett and Helen Burnett, owners of The Club, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and Charles E. Smith, aka Wendell R. Ware, well knowing at the time that the check was false and forged.

Count VI of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and John Walker, aka Thomas A. Brown, did wilfully, unlawfully and feloniously with intent to injure and defraud Dukal Enterprises, Incorporated, a corporation duly organized and incorporated in the Territory of Alaska, the owners of a certain business enterprise, the Hanover Gift Shop, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond

Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count VII of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown did wilfully, unlawfully and feloniously, with intent to injure and defraud John D. Harris, owner of the Anchorage Liquor Store, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count VIII of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown, did wilfully, unlawfully and feloniously, with intent to injure and defraud Wilma Jones and Cecil Jones, the owners of Hank's Hardware, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count IX of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown,

did wilfully, unlawfully and feloniously, with intent to injure and defraud C. T. Rewak, owner of Tom's Radio Service, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown well knowing at the time that the check was false and forged.

Count X of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown, did wilfully, unlawfully and feloniously, with intent to injure and defraud Robert W. Stratton, Jr., owner of Stratton's Gateway Service, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown, well knowing at the time that the check was false and forged.

Count XI of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown, did wilfully, unlawfully and feloniously, with intent to injure and defraud Roy McKay, owner of McKay's Hardware, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and John Walker aka Thomas A. Brown, well knowing at the time that the check was false and forged.

Count XII of the indictment charges that on or about the 1st day of September, 1956, at or near

Anchorage, Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods, did wilfully, unlawfully and feloniously, with intent to injure and defraud Thomas B. Waters, owner of the Frontier Loan Company, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XIII of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods, did wilfully, unlawfully and feloniously, with intent to injure and defraud Sonja Davis and Walter Davis, owners of the Davis Liquor Store, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check, the said James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods well knowing at the time that the check was false and forged.

Count XIV of the indictment charges that on or about the 1st day of September, 1956, at or near Anchorage, Alaska, James Burton Ing, Raymond Wright and Dewey Taylor aka James C. Woods, did wilfully, unlawfully and feloniously, with intent to injure and defraud Robert J. Shimek and Violet D. Shimek, owners of the Record Shop, The Radio-TV Center, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine a forged check, the said James Burton Ing,

Count XX of the indictment charges that on or about the 1st day of September 1956, at or near Mile 113, Glenn Highway, Third Judicial Division, District of Alaska, James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams, did wilfully, unlawfully and feloniously, with intent to injure and defraud Gertrude Jurgeleit and Oscar Jurgeleit, owners of the Sheep Mountain Lodge, a partnership duly organized in the Territory of Alaska, utter and publish as true and genuine, a forged check, the said James Burton Ing, Raymond Wright and Lemuel Ashly Williams aka Theodore Williams, well knowing at the time that the check was false and forged.

2.

This indictment is a mere allegation of the charges against the defendants and is not, in itself, any evidence of guilt, and no juror should permit himself to be influenced against the defendants because of the fact that an indictment has been returned against the defendants.

To this indictment the defendants, James Burton Ing, Raymond Wright and Charles E. Smith, have pleaded not guilty, which pleas are a denial of the charges and put in issue every material allegation of the indictment.

It, therefore, becomes the duty, and it is incumbent upon the Government to prove every material element of the charges contained in the indictment to your satisfaction beyond a resonable doubt.

The exact date of the commission of the crime charged in the indictment is not material provided the crime was committed within five years prior to the date of the indictment. It is sufficient if you find the crime so charged was committed on any date within five years prior to the date of the indictment.

The law presumes every person charged with crime to be innocent. This presumption of innocence remains with the defendants throughout the trial and should be given effect by you unless and until, by the evidence introduced before you, you are convinced the defendants are guilty beyond a reasonable doubt.

3.

Each count set forth in the indictment charges a separate and distinct offense. You must consider the evidence applicable to each alleged offense as though it were the only accusation before you for consideration, and you must state your finding as to each count in a separate paragraph in the verdict, uninfluenced by the mere fact that your verdict as to any other count or counts is in favor of, or against, the defendants. They may be convicted or acquitted upon any or all of the offenses charged, depending upon the evidence and the weight you give to it, under the court's instructions.

3-A.

You are instructed that all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the

act constituting the crime or aid and abet in its commission, though not present, are principals, and to be tried and punished as such. However, one who is merely present, but does nothing to aid, assist or abet or induce the other to commit the crime is not guilty. It must be shown that he actually participated in its commission from which it follows that if the evidence warrants you may find one of the defendants guilty and the other not guilty. Therefore, if you find from the evidence beyond a reasonable doubt that the defendants, acting either in concert or in pursuance of a previous understanding or common design, committed the crime charged in the indictment, each would be guilty as principal regardless of which of them uttered and published the checks in question, for it is immaterial to what degree any one of them participated in the commission of the crime so long as you find beyond a reasonable doubt that any one knowingly aided, abetted or assisted the others, or any of the others, in its commission.

4.

In this trial, originally there were six (6) separate individuals named as defendants in the indictment. Three of these defendants, namely, John Walker, Dewey Taylor, and Lemuel Williams have heretofore pleaded guilty to the charges brought against them. Therefore, you are instructed that you are not to concern yourselves with the guilt or innocence of the defendants Walker, Taylor and Williams. You are further instructed that the pleas of guilty as to the defendants Walker, Taylor and Williams

have nothing to do whatsoever with the guilt or innocence of the defendants James Burton Ing, Raymond Wright and Charles E. Smith, and you are not to consider the pleas of John Walker, Dewey Taylor and Lemuel Williams when considering the guilt or innocence of James Burton Ing, Raymond Wright and Charles E. Smith.

You are further instructed that these three (3) defendants, James Burton Ing, Raymond Wright and Charles E. Smith, were jointly charged and placed on trial together, and you are to consider the charges as applying to all of them together as well as to each one separately insofar as each separate count charges all three (3) defendants; and on those counts that do not charge all three (3) jointly and separately, then you are instructed to consider only those defendants named in that particular count or counts.

5.

The laws of Alaska provide “* * * That if any person shall, with intent to injure or defraud anyone, falsely make, alter, forge, counterfeit * * * any check * * *; or shall, with such intent, knowingly utter or publish as true and genuine any such false, altered, forged, counterfeited * * * instrument, or matter whatever, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary * * *”

Counts I through XX of the indictment are brought under these provisions of the law.

6.

In this case, the Government relies in part upon the testimony of admitted accomplices.

You are instructed that an accomplice is one who, being of mature age and in possession of his natural faculties, co-operates with or aids or assists another in the commission of a crime.

With respect to such testimony, the laws of Alaska provide as follows:

“A conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.”

The provision of Alaska law which is quoted means that the corroborating evidence required to be given before conviction can be had must, in itself, and independent of all accomplice testimony, tend to connect the defendants with the commission of the crimes charged against them, and must tend to show not only that the crimes have been committed, but that the defendants were implicated in them. Corroborating testimony need not be direct; it may be circumstantial; and, whether direct or circumstantial, if it corroborated the testimony of an accomplice in a material particular and tends to connect the defendants with the crimes charged, it is suffi-

cient to meet the requirements of the statute and support a conviction.

This law does not mean that the corroborative evidence alone must be sufficient to justify conviction, but it does require that unless in your judgment the corroborative evidence alone and by itself tends to connect the defendants with the crimes charged, the defendants should be acquitted, no matter how convincing the accomplice testimony may be.

If you find that the corroborative evidence alone, if any, does tend to connect the defendants, or any of them, with the commission of the crimes charged against them, then you should consider all of the evidence against such defendant or defendants, including all accomplice testimony, and if all of the evidence, including both that of the accomplices and that of the corroborative testimony, convinces you beyond a reasonable doubt of the guilt of the defendants, or any of them, you should render a verdict accordingly; otherwise the defendants, or any of them, should be acquitted.

Section 58-5-1, Compiled Laws of Alaska, 1949, provides in part as follows:

“That the testimony of an accomplice ought to be viewed with distrust.”

You are accordingly instructed that the testimony of the government witnesses, self-confessed accomplices in the commission of the crimes charged in the indictment in the case now on trial before you, ought to be viewed with distrust.

7.

You are hereby instructed that before you can find the defendants, or any of them, guilty of the charges set forth in each individual count of the indictment, the Government must prove:

First, that the crimes, if any, in Counts I through XIX, were committed at or near Anchorage, Third Judicial Division, District of Alaska, on or about the 1st day of September 1956, and that the crime, if any, charged in Count XX of the indictment, was committed at or near Mile 113, Glenn Highway, Third Judicial Division, District of Alaska, on or about the 1st day of September 1956;

Second, that at said times and places, the defendants, or any of them, did knowingly, wilfully, unlawfully, fraudulently and feloniously, with intent to injure and defraud, falsely make, forge and counterfeit checks for the payment of money drawn on the First National Bank of Anchorage, the tenor and purport of which are set out in the indictment in this case;

Third, that the signatures written on the face of said checks purported to be genuine signatures of the makers thereof, whereas in truth and in fact said checks were not signed by the consent or authority of the purported makers, and that the names of the purported makers of the checks were actually signed to said checks by some other person.

Fourth, that the defendants, or any of them, at the said times and places set forth in the indictment,

having in their possession checks with false, forged and counterfeited signatures written on the faces thereof, drawn on the First National Bank of Anchorage, copies of which appear in each count of the indictment, and purporting to have been signed by persons other than the defendants, did, with intent to injure and defraud, wilfully, feloniously, knowingly and unlawfully utter and publish as true and genuine to the business concerns listed in the various counts said false, forged and counterfeited checks;

Fifth, that the said defendants, at the times of uttering and publishing said checks to the business concerns listed in the indictment, knew that said checks had not been signed by the persons represented on the checks, or by the consent or with the authority of such persons, but that the signatures of such persons on said checks were forged, counterfeited and false.

If the Government has proved each and all of the essential elements of the crimes charged in the indictment to your satisfaction beyond a reasonable doubt, then you should find the defendants guilty of the crimes charged in the indictment, but if the Government has failed to prove any of the essential elements of the crimes charged in the indictment to your satisfaction beyond a reasonable doubt, then you should acquit the defendants or such of the defendants as you find there has been no proof against, as stated above.

8.

“Forgery” may be defined as the fraudulent

making or altering of any writing to the prejudice of another person's rights.

To "utter" a check means to offer it, to attempt to pass it, and to "publish" a check means to pass and deliver it to another as good and genuine. To "utter and publish" a forged check means not only that it is offered but that it is passed and delivered to another as being a good and genuine check. The allegation that defendants, or any of them, did "utter and publish" a certain check or checks alleged to have been forged is supported by any evidence that they offered to pass or deliver said check or checks and did pass and deliver them to some other person as genuine instruments, declaring or asserting, directly or indirectly, by words or acts, that the check or checks were good.

As used in the indictment in this case, the word "wilfully" means knowingly, intentionally and designedly.

The word "feloniously" means with criminal intent and evil purpose.

The word "unlawfully" means wrongfully or contrary to law.

"Defraud" means to cheat or to deprive of, and applies to both property and rights. The phrase "intent to defraud" as used in this case means a purpose on the part of defendants, or any of them, to cheat or dishonestly deprive some person of money.

“Knowingly” means with knowledge. In cases such as this, it implies not only knowledge but bad purpose and evil intent.

9.

In every crime, such as charged in this case, there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

A person is held to intend every act which is knowingly done. An act is done knowingly if done voluntarily and purposely, and not because of mistake or inadvertence or other innocent reason.

A person is also held to intend all the natural and probable consequences of acts knowingly done. That is to say, the law assumes a person to intend whatever consequences should reasonably be expected to result from every act which is knowingly done.

10.

A reasonable doubt is a doubt which is reasonable in view of all of the evidence, and such as arises upon an impartial comparison and consideration of all of it, or from lack of evidence, and prevents the jury from being able candidly and truthfully to say that they have an abiding conviction of the defendant's guilt.

The very use of the word “reasonable” in the term “reasonable doubt” indicates that by a reasonable doubt is not meant any vague, formless, or

imaginary doubt or conjecture which may come into your minds, or which may be created out of sympathy for the accused or another, or out of kindness of heart.

A reasonable doubt must be a substantial doubt, such as an honest, sensible, fairminded person, animated by a conscientious desire to ascertain the truth, may with reason entertain.

If, after examining carefully all the facts and circumstances in the case, in the light of the law as stated by the Court, you have a settled and abiding conviction of the guilt of the defendant, then you are satisfied of guilt beyond a reasonable doubt; but if you do not have such a conviction of the defendant's guilt, then you should acquit.

11.

In this case, the defendants have elected not to take the witness stand. You are hereby instructed that under the law they have this right not to take the witness stand if they so elect, and you are instructed that you are not to draw any unfavorable inference against them on that account.

12.

Some of the evidence in this case is of the type called circumstantial, as distinguished from direct evidence. Direct evidence is given when a witness testifies of his own actual and personal knowledge to the facts in issue and to be proved. Circumstantial evidence is given when a witness testifies in like

manner to facts from which may be inferred the facts in issue and to be proved. Accordingly, circumstantial evidence may be defined as that type of evidence in which proof is given of certain facts and circumstances from which the jury may infer other and connected facts which usually and reasonably follow from the facts testified to according to reason and the common experience of mankind. Circumstantial evidence is sometimes quite as convincing as direct evidence; in other cases, less so. But to be of any weight or force against a person accused of crime, circumstantial evidence must be of such nature as reasonably to lead to the inference of the defendant's guilt and be inconsistent with any other reasonable theory than that of guilt.

In this case the proof consists of both direct and circumstantial evidence. Both should be carefully considered. It is for you to determine the weight of the circumstantial evidence as well as of the direct evidence, neither enlarging nor belittling the force of either; and if all of the evidence, when taken as a whole and fairly and candidly weighed, convinces you beyond reasonable doubt of the defendant's guilt, a verdict finding the defendant guilty should be returned accordingly; otherwise, the defendants should be acquitted.

13.

All questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the

Court, and all discussions of law addressed to the Court; and although every jury has the power to find a general verdict which included questions of law as well as of fact, you are not to attempt to correct by your verdict what you may believe to be errors of law made by the Court.

All questions of fact—unless so intimately related to matters of law that a determination must be made thereon by the Court as questions of law—must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your judgment, to speak the truth or otherwise as to matters within his knowledge.

14.

During the trial of a case, it may be suggested or argued that the credibility of a witness has been "impeached." To "impeach" means to bring or throw discredit on; to call in question; to challenge; to impute some fault or defect to.

The credibility of a witness may be impeached by the nature of his testimony, or by contradictory evidence, or by evidence affecting his character for truth, honesty or integrity; or by proof of his bias, interest or hostility, or by proof that he has been convicted of a crime. The credibility of a witness may also be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the case. However, the impeachment of the credibility of a witness does not necessarily mean that his testimony is completely deprived of value, or even that its value is lessened in any degree. The effect, if any, of the impeachment of the credibility of the witness is for the jury to determine.

Discrepancies in the testimony of a witness, or between his testimony and that of others, if there be any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent mistake in recollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently, or see or hear only portions of it, or that their recollections of it will disagree. Whether a discrepancy pertains to a

fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of serious importance. Whenever it is practicable and reasonable, you will attempt to reconcile conflicting or inconsistent testimony, but in every trial you should give credence to that testimony which, under all the facts and circumstances of the case, reasonably appeals to you as the most worthy of belief.

15.

You are not bound to believe something to be a fact simply because a witness has stated it to be a fact, if you believe from all the evidence that such witness is mistaken or has testified falsely concerning such alleged fact.

Where witnesses testify directly opposite to each other on a given point, and are the only ones that testify directly to that point, you are not bound to consider the evidence evenly balanced or the point not proved; but in determining which witness you believe on that point, you may consider all the surrounding facts and circumstances proved on the trial, and you may believe one witness rather than another if you think such facts and circumstances warrant it.

16.

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conclusion, founded upon the law and the evidence of the case, in order to agree with other jurors, every juror, in

considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to get at the truth, and with the view of arriving at a just verdict.

No jurors should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty.

17.

While you are not justified in departing from the rules of evidence as stated by the Court, or in disregarding any part of these instructions, or in deciding the case on abstract notions of your own, or in being influenced by anything except the evidence or lack of evidence as to the facts of the case, and the instructions of the Court as to the law, and the inferences properly to be drawn from the facts and from the law as applied to the facts, there is nothing to prevent you from applying to the facts of this case the sound common sense and experience in affairs of life which you ordinarily use in your daily transactions and which you would apply to

any other subject coming under your consideration and demanding your judgment.

18.

At the close of the trial, counsel have the right to argue the case to the jury. The arguments of counsel, based upon study and thought, may be, and usually are, distinctly helpful; however, it should be remembered that arguments of counsel are not evidence and cannot rightly be considered as such. It is your duty to give careful attention to the arguments of counsel, so far as the same are based upon the evidence which you have heard and the proper deductions therefrom, and the law as given to you by the Court in these instructions. But arguments of counsel, if they depart from the facts or from the law, should be disregarded. Counsel, although acting in the best of good faith, may be mistaken in their recollection of testimony given during the trial. You are the ones to finally determine what testimony was given in this case, as well as what conclusions of fact should be drawn therefrom.

19.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However, your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against a presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others.

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and, therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

20.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to select one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore charged, your duty is to determine the facts from the evidence admitted in the case, and to apply to those facts the law as given to you by the Court in these instructions.

During the trial I have not intended to make any comment on the facts or express any opinion in regard thereto. If, by mischance, I have, or if you think I have, it is your duty to disregard that comment or opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

21.

Upon retiring to the jury room, you will elect one of your number foreman who will speak for you and sign the verdict agreed upon. You will take with you to the jury room these instructions, the exhibits, and the three forms of verdict which have been prepared for your use.

If you find the defendant, James Burton Ing, guilty of the crime charged in Count I of the indictment, you will draw a line in the blank space before the word "guilty" in paragraph one of Verdict No. 1. If you find the defendant, James Burton Ing, not guilty of the crime charged in Count I of the indictment, you will insert the word "not" in the blank space before the word "guilty" in said paragraph one. You will follow the same procedure in the following paragraphs for Counts II through XX of the indictment. Your foreman will thereupon date and sign Verdict No. 1 and return the same into court as your verdict.

If you find the defendant, Raymond Wright, guilty of the crime charged in Count I of the in-

dictment, you will draw a line in the blank space before the word "guilty" in paragraph one of Verdict No. 2. If you find the defendant, Raymond Wright, not guilty of the crime charged in Count I of the indictment, you will insert the word "not" in the blank space before the word "guilty" in said paragraph one. You will follow the same procedure in the following paragraphs for Counts II through XX of the indictment. Your foreman will thereupon date and sign Verdict No. 2 and return the same into court as your verdict.

If you find the defendant, Charles E. Smith, guilty of the crime charged in Count I of the indictment, you will draw a line in the blank space before the word "guilty" in paragraph one of Verdict No. 3. If you find the defendant, Charles E. Smith, not guilty of the crime charged in Count I of the indictment, you will insert the word "not" in the blank space before the word "guilty" in said paragraph one. You will follow the same procedure in the following paragraphs for Counts II, III, IV and V of the indictment. Your foreman will thereupon date and sign Verdict No. 3 and return the same into court as your verdict.

If you unanimously agree upon your verdicts during business hours, that is, between 9 a.m. and 5 p.m., you may have your foreman date and sign them and return them into open court in the presence of the entire jury, together with these instructions. If, however, you agree upon your verdicts after business hours, that is, after 5 p.m. one day

and before 9 a.m. the following day, you should similarly have your foreman date and sign them and seal them in the envelope accompanying these instructions. The foreman will keep this envelope in his possession unopened and the jury may separate and go to their homes, but all of you must be in the jury box when the court next convenes at 10 a.m. when the verdicts will be received from you in the usual way.

Given at Anchorage, Alaska, this 27th day of February, 1958.

/s/ J. L. McCARREY, JR.,
U. S. District Judge.

[Endorsed]: Filed February 28, 1958.

TRANSCRIPT OF EXCERPT OF PROCEEDINGS ON TRIAL

* * *

The Court: Counsel may come to the bench and take exceptions, if any they have, to the instructions prepared by the Court.

(Thereupon, all counsel approached the bench together with the Court Reporter and the following proceedings were had out of the presence of the jury:)

The Court: Mr. Plummer, do you have any----

Mr. Hepp: Before objections are taken up, I'd like to be heard on a certain matter.

(At this time another matter, other than the exceptions to the instructions, was heard, after which the following proceedings were had out of the presence of the jury:)

The Court: Now, Mr. Plummer, do you have any exceptions?

Mr. Plummer: The only exception I have, your Honor, is that I have no exception at all to the instructions as they are presented. I would like an exception—or, I feel that the proposed instruction of the prosecution should have been included to show that his actual presence at the time of the passing of the checks was not necessary to make him a principal in the matter. I did submit a proposed instruction which is just—I took it right out from the Territorial Statute and I did not run across it there and I think it properly should be. I am afraid the jury will think, “Well, if he was down someplace else and the checks were cashed, that although he might have been guilty of conduct—aiding their passing—and so he need not be guilty as a principal in crime,” which is the reason I made the requested instruction and I do feel it should be in there. It's, in fact, a quotation from the Territorial Statute.

The Court: Well, as a matter of fact, the Court ordinarily gives that and that fact had been overlooked. Miss Turner.

(Thereupon, the Court had an off-the-record discussion with his secretary, after which the following proceedings were had out of the presence of the jury:)

The Court: Mr. Plummer——

Mr. Plummer: With that exception, I have no other comment to make, your Honor.

The Court: Very well. Mr. Hepp.

Mr. Hepp: I have none. I believe Mr. Kay and Mr. Nesbett have some that I may join in.

The Court: Mr. Gore, do you have any?

Mr. Gore: I'd like to——

The Court: Well, maybe we better wait for Mr. Kay, though. Mr. Kay, now, do you take any exceptions?

Mr. Kay: I take exception to the emphasis in Instruction No. 2. I feel that the last paragraph, mainly the very vital statement of the presumption of innocence, should be afforded a separate instruction. I feel that tagging it on after an instruction relative to the fact that it's immaterial whether the crime was relative to the time element doesn't give the proper emphasis—doesn't give the—on the presumption of innocence and should be given a separate instruction.

The Court: Let the exception be noted.

Mr. Kay: Now, as to Instruction 6, I feel that Instruction 6 possibly—or, I will strike the “possibly.” Instruction 6 correctly states the law where there is a question as to whether or not a particular individual is or is not an accomplice.

However, in this case, where the evidence is clear and uncontradicted and there is no conflict in the evidence, the question of who is an accomplice is a question of law for the Court. Here, there was no conflict. The evidence was undisputed and therefore, it would become the duty of the Court to instruct that Walker and Taylor was a participant in the crime.

The Court: Walker and who?

Mr. Kay: Dewey Taylor. It would be equally the duty of the Court, though Brownfield admitted a participation in the forgery of the checks——

The Court: Pardon me, Mr. Kay. You say that Brownfield is an accomplice, although the charge is for uttering and publishing * * *

Mr. Kay (Continuing): Uttering and publishing forged checks. Now, who forged those checks? Brownfield did.

The Court: But it was uttering and publishing, not forging.

Mr. Kay: Anyone who participates as an accessory before the fact is a principal under the Alaska Statute—guilty as a principal. Anyone who is guilty as a principal is an accomplice. Now, who could, or might, be guilty as a principal? Anyone, therefore, who engaged, assisted, aided or participated in the commission of this crime which is the preparation of these—involves everything, includes the transportation, the forging of these checks, the preparation of them, the distribution of them and the passing of them. If he aided and assisted in any way, he is an accessory before the fact and an accomplice and I think that the law—the facts are undisputed

and clear and I think the Court should instruct that Brownfield was an accomplice.

The Court: Mr.—

Mr. Kay: In that regard, I except to the failure of the Court to give the proposed instruction submitted by the Defendant Ing this morning, stating that the Defendant Walker and the Witness Brownfield were accomplices—failure to give that instruction, and I believe it is——

The Court: Did you have any other exception?

Mr. Kay: No.

The Court: Mr. Nesbett.

Mr. Nesbett: Only, your Honor, to except to the failure of the Court to give any instruction to the effect that admissions made by a defendant while in custody must be voluntarily and that the burden of proving the voluntary nature of the statements is on the Government and I realize I didn't submit one on those points, your Honor, and—well, that is all I have to say.

Instruction 2—there is vital information there and you left out the word “not” in front of the word “guilty”, I believe, your Honor.

The Court: Point that out to me, please.

Mr. Nesbett: I don't have the page numbers; I can't tell, but it's on this (indicating) instruction, Line 2, Paragraph 2.

The Court: Let the record show the Court has now inserted the word “not guilty” as requested by counsel for the Defendant, Mr. Smith. Very well. Did you wish to be heard further?

Mr. Plummer: No.

(Thereupon, the Court reads the instructions to the jury, after which the following proceedings were had:)

Mr. Plummer: May counsel approach the bench, your Honor, just briefly—just one more time?

The Court: Very well.

(Thereupon, all counsel approached the bench together with the Court Reporter and the following proceedings were had out of the presence of the jury:)

Mr. Plummer: Will you turn to No. 7? Would you look at the last line and the fourth paragraph?

The Court: Line what?

Mr. Plummer: Line 23.

The Court: Yes.

Mr. Plummer: It says, "checks by one of the defendants". I think we are getting instructed right out of Court. I didn't notice it and I am sorry.

The Court: What would you propose?

Mr. Plummer: If we would just write in there, "by some one else" and delete "by one of the defendants".

The Court: Any objection?

Mr. Kay: Let me read it, your Honor. I can't understand what is going on.

Mr. Plummer: See, we are not charging with forgery?

The Court: Yes. Would you object if it were put, "by some other person"?

Mr. Plummer: That would be fine.

The Court: Without objection, the Court has

changed Line 23 to now read “* * * said checks by some other person”.

Mr. Plummer: I’m sorry, your Honor, I didn’t catch it.

The Court: Yes. Well, that is inadvertence on the part of the Court’s secretary in drawing the original.

Mr. Nesbett: And delete the words, “one of the defendants?”

The Court: Yes, “by some other person.”

(Thereupon, all counsel, together with the Court Reporter resumed their respective seats and the following proceedings were had in the presence of the jury:)

The Court: Will the bailiffs please come forward?

* * *

United States of America,
Territory of Alaska—ss.

I, Bonnie T. Brick, Official Court Reporter of the above-entitled Court, hereby certify:

That the foregoing is a true and correct transcription of excerpt of proceedings in the above-entitled taken by me in stenograph in open court at Anchorage, Alaska, on the 27th day of February, 1958, and thereafter transcribed by me.

/s/ BONNIE T. BRICK.

[Endorsed]: Filed November 12, 1958.

[Endorsed]: No. 16041. United States Court of Appeals for the Ninth Circuit. Charles E. Smith, Appellant, vs. United States of America, Appellee. Second Supplemental Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed November 25, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 16,041

United States Court of Appeals
For the Ninth Circuit

CHARLES E. SMITH,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF FOR APPELLANT.

BUELL A. NESBETT,

First National Bank Building,
Anchorage, Alaska,

Attorney for Appellant.

FILED

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PAUL P. O'BRIEN, CLERK



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No. 16,041

United States Court of Appeals For the Ninth Circuit

CHARLES E. SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

On October 29, 1957, the grand jury indicted James Burton Ing, Raymond Wright, Appellant Charles E. Smith, John Walker, Dewey Taylor and Lemuel Ashley Williams. The indictment was filed in the District Court for the District of Alaska, Third Judicial Division at Anchorage and consisted of twenty counts charging James Burton Ing and Raymond Wright and various of the other defendants with uttering and publishing forged checks in violation of Section 65-6-1 ACLA 1949. (Tr. 3-22.)

Appellant was named only in Counts I through V of the indictment along with Ing and Wright.

The defendants Walker, Taylor and Williams entered pleas of guilty and testified for the Government at the trial.

The trial of Ing and Wright on all counts of the indictment and of Appellant Charles E. Smith on the first five counts was completed on February 28, 1958. Smith was found guilty on Counts I, III, IV and V and not guilty on Count II. (Tr. 24.) Ing was found guilty on all counts of the indictment and Wright found guilty on all except five counts. The proof insofar as the Appellant Smith was concerned had little in common with that applicable to Ing and Wright who were charged with being the ringleaders of the check passing scheme. Separate counsel represented each of the parties.

On March 3rd, 1958 Appellant was sentenced to imprisonment for 5 years on each of Counts I, III, IV and V to run concurrently, with 2 years suspended on condition he make restitution. (Tr. 25-26.)

The U. S. District Court had jurisdiction of the indictment and trial under the provisions of Sections 53-1-1, 53-2-1 and 65-6-1 of Alaska Compiled Laws Annotated, 1949.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Sections 1291 and 1294, Chapter 83, New Title 28 U.S.C.

STATEMENT OF THE CASE.

The determination of what the writer considers to be Appellant's strongest point on appeal will turn on the answer to the following question which is in part a statement of the case.

"Where a defendant was arrested in Seattle on Friday, March 15, 1957 at 3:00 o'clock P.M. without being advised of the reason for the arrest or shown any warrant, was taken to the King County Jail without being advised of his rights, interrogated by arresting officers until 6:00 or 6:30 P.M. of that day when he finally signed a consent to extradition, and was interrogated again for at least one hour on Saturday, March 16th and again interrogated on Sunday, March 17th for approximately 3 hours at the beginning of which interrogation he was told by an Alaska police officer that he had better make a statement and that it would be made known up here (in Alaska) and go easier on him if he did make a statement, after which time a confession was finally obtained, and the defendant having been prevented by the interrogators from conferring with his attorney during the latter portion of the Sunday interrogation although counsel was at the door of the interrogation room demanding admission, and

Where the defendant was possibly then arraigned in Seattle on Monday, March 18th or Tuesday, March 19th (confusion—and real question of whether defendant was actually arraigned) and then returned to Anchorage, Alaska, in the constant custody of the Special Agent who obtained and wrote the confession,

who discussed the confession with the defendant en route and obtained admissions from the defendant reiterating statements contained in the confession, and

Where the defendant was then arraigned in Anchorage, Alaska, on Thursday, March 21st, waiving preliminary hearing (without counsel) and placed under \$10,000 bail (concededly a legal arrangement and probably the first) and retained in custody until April 4th when bail was reduced to \$2,500.00 and release effected and counsel obtained, and

Where the defendant, during the period he was still in jail in Anchorage, was frequently visited by the same Special Agent who obtained and wrote the confession and who accompanied him to Alaska, was taken from the jail by that Special Agent to the office of the United States Attorney for questioning on the confession where he verified the statements in the confession and again on March 27th was taken from jail by the same Special Agent in the company of other officers to make a tour of the Anchorage area for the ostensible purpose of identifying roads and places mentioned in the confession and also taken to Alaska Territorial Police headquarters where he was questioned on the confession, and again reiterated the statements contained in the confession (still being without counsel) and

Where the trial Court ruled the confession inadmissible because of violation of Rule 5, Federal Rules of Criminal Procedure, and because of duress and coercion,

Was it error for the trial Court to then permit an officer of the Territorial Police to testify and relate the admissions made by the appellant on March 27th under the before mentioned circumstances?

The above statement of facts, in the form of a question, is based on the testimony of appellant which is summarized in the following paragraphs with transcript references. Appellant's testimony is contradicted in part by the testimony of Special Agent Edward Harkabus which is also summarized with transcript references.

The two Alaska officers who witnessed the confession and took part in the interrogations were not present at the trial. Lt. Trafton of the Territorial Police was on vacation in Japan and Detective Pass, dismissed by the Anchorage Police Department in October of 1957, was under doctor's care in North Carolina. (Tr. 180-182.)

The appellant Smith was arrested at the home of his mother and father in Seattle, Washington, on Friday, March 15, 1957, at about 3:00 in the afternoon by Lt. Trafton of the Alaska Territorial Police, Detective Pass of the Anchorage Police Department and Sheriff Weeland of King County, Washington. (Tr. 193-194.) The officers were accompanied by a Mr. Harkabus, a special agent for the Board of Fire Underwriters and former FBI agent.

According to appellant Smith's testimony, he was talking on the telephone to the police car of Sheriff Weeland, on a "pretext call", when the officers

knocked on the back door of the house. Appellant's mother answered the door and stated in response to a question by the officers that the appellant was not at home. According to appellant, the officers pushed his mother aside and came on in the house, Sheriff Weeland stating to appellant that he was under arrest. No warrant was shown to the appellant nor was he advised of any charge. (Tr. 193-194.) Appellant was immediately taken in the sheriff's car to the King County Jail in Seattle and to the sheriff's office where he was questioned by Trafton, Pass and Harkabus. (Tr. 195-196.) Appellant was in the office about three hours and in addition to the questioning he was requested to sign extradition papers which he at first refused to do. He likewise refused to make any statements concerning the matters he was being questioned on. Finally, about 6:00 or 6:30 o'clock P.M., in the sheriff's office, appellant signed the papers which would permit him to be returned to Alaska, which he believes were extradition consents. (Tr. 197.)

After signing the papers appellant was taken back to his cell where he remained alone until about noon of Saturday when he was taken out of the cell to an anteroom in the same area to be questioned by Lt. Trafton and Detective Pass. (Tr. 198-199.) After one hour of questioning during which time appellant made no statements concerning the matters on which he was being questioned, he was returned to his cell. (Tr. 199.) On Sunday about 12:30 o'clock P.M. he was taken out of his cell again and into the same anteroom where he had been questioned the preceding day. On this occasion Lt. Trafton, Detective Pass and Special

Agent Harkabus were present in the room. At the commencement of this interview appellant was advised by Detective Pass that he had better make a statement. (Tr. 200.) He was in the room approximately 3 hours. (Tr. 200.) After appellant had been in the room for a period of about two and one-half hours with the three officers beforementioned, the jailer came into the anteroom and advised that there was an attorney outside who wished to see appellant. (Tr. 200-201.) The jailer was advised by Mr. Harkabus that the attorney could see appellant when the officers had finished their questioning. (Tr. 200.) Approximately 15 minutes later the jailer returned and stated to the officers that it was his opinion that appellant had a right to see an attorney and that an attorney was waiting to talk with appellant. The jailer was then advised by Harkabus that the attorney could see appellant in a few minutes. (Tr. 201.) On the second occasion the jailer again remarked that appellant had a right to see his attorney. (Tr. 201-202.) Shortly thereafter the jailer appeared at the door of the anteroom and by his side was the attorney. The attorney came to the doorway and asked appellant if there was anything appellant wished to see him about. (Tr. 202.) The attorney's name was Harris and had been sent to the jail to interview appellant by appellant's father. (Tr. 203.) At the time appellant's attorney was standing at the door of the anteroom with the jailer, appellant was sitting at the table with Special Agent Harkabus and Lt. Trafton. Detective Pass was standing near the table. None of the officers made any statement when the attorney ap-

peared, and in response to the attorney's question appellant stated that there was nothing for him to see the attorney about. (Tr. 203.) At the time the attorney appeared the officers were in the process of writing down statements from the defendant concerning his implication in the crime charged in the indictment. (Tr. 203-204.) The officers made no statement to appellant that he had a right to see his attorney or could leave the room in the attorney's and jailer's company in order to confer. (Tr. 204.) Up to the time the attorney appeared appellant had signed no statement, but was ready to sign a statement which Harkabus was in process of writing out in longhand. (Tr. 204.) Immediately after the attorney left, appellant signed the longhand statement which had been written out by Harkabus. (Tr. 204.) According to appellant's recollection the statement which was written out in longhand by Harkabus was preceded by a statement reading roughly to the effect, "This statement will not be used against you." (Tr. 205.) That evening a typewritten statement was given to appellant to sign. Appellant was brought out of his cell and into the anteroom again about an hour after the signing of the longhand statement in order to sign the typewritten statement. (Tr. 205.)

Appellant states that he was never advised by any of the officers that he needn't make any statement if he did not want to. (Tr. 205-206.)

Appellant states that the reason he did not get up and demand to see his attorney is that by the time the attorney finally got in the room the statement had

been practically written out by Harkabus and he, appellant, "didn't want to cause any trouble" and "it was just about over with." (Tr. 206.)

During the interview just mentioned and prior to the making of the statement appellant states that Detective Pass advised appellant that if he would cooperate he (Pass) would see that it was known up in Alaska where appellant was to be returned.

The statement was finally signed around 5:00 or 5:30 o'clock P.M. on Sunday. (Tr. 206.) After signing, appellant was returned to his cell where he remained until he was called into a Commissioner's office where a hearing was held, the exact nature of which seems to be vague in appellant's mind. Attorney Harris was present, a judge was in the room and extradition was discussed. Appellant's recollection is that Attorney Harris was arguing that appellant was wrongfully arrested and denied the right to counsel and that Harris was fighting extradition. (Tr. 207-208.) Appellant was asked no questions and took no part in the proceeding but sat near his mother and father during the entire hearing. After the hearing which lasted about a half hour he was returned to his cell where he remained for a day or two until he was placed on an airplane to come to Anchorage, Alaska. (Tr. 208.)

Appellant was accompanied on the trip to Alaska by Special Agent Harkabus, riding "two-abreast" on the airplane. Harkabus discussed the statement with appellant during the trip and caused appellant to admit its truth. (Tr. 133-135.)

Appellant was placed in the Federal Jail upon his arrival in Anchorage where he remained for about two days when he was taken before the United States Commissioner and a complaint read to him. Appellant states that he was advised of his rights on that occasion and signed a slip which he understood was a waiver of a preliminary hearing. (Tr. 208-209.) Appellant remained in jail approximately another 10 days under bail in the amount of \$10,000.00. (Supp. Tr. 295.) During the 10-day period he was taken from the jail on several occasions by Detective Pass and Special Agent Harkabus. (Tr. 134-135.)

During the time appellant's attorney was attempting to see him in the King County Jail argument occurred between the attorney and Harkabus and Detective Pass because the attorney was prevented from seeing appellant. (Tr. 212.)

Appellant states that never to his knowledge was he arraigned in the State of Washington. (Tr. 214.)

On the Sunday on which appellant signed the written statement and prior to the signing, he was advised by Detective Pass that if he would make a full confession it would go a lot easier with him, or words to that effect. (Tr. 218.) Appellant's own phrasing of the statement made by Detective Pass is that if he would cooperate it would go a lot easier on him. (Tr. 218.) The statement was made immediately after the statement by Detective Pass.

Counsel for appellant Smith objected to the introduction of the typewritten statement in evidence and the objection was sustained. (Tr. 227.) The Court

stated that the officers had not complied with Rule 5, too much time had elapsed between the date of arrest and the day of the first arraignment and upon those facts plus others there were sufficient grounds to refuse to permit the confession to be introduced. (Tr. 227.)

Plaintiff's Exhibit No. 23 for identification was never introduced into evidence. It is set out verbatim in supplemental transcript at pages 294-295. This exhibit indicates that the original complaint against the appellant was issued on March 14, 1957, that a warrant issued on the same date. On March 21, 1957 the defendant appeared without counsel and according to the transcript of proceedings was advised of his rights and waived preliminary hearing. Bail was set at \$10,000.00. (Supp. Tr. 295.)

After the Court had sustained defense counsel's objections to introduction of the confession the United States Attorney then stated that he proposed to call as witnesses police officers who would testify to admissions made by the appellant indicating his guilt after he had been arraigned in Anchorage. Counsel for appellant objected on the ground that the violation of Rule 5 of the Federal Rules of Criminal Procedure in Seattle when the confession was obtained would carry over and destroy the protection afforded by Rule 5. (Tr. 238-239.) Counsel for appellant argued that the coercion exercised on appellant while he was in custody in Seattle and under constant questioning by the officers which resulted in an illegal confession, continued on during his transfer to Alaska

(he was closely accompanied on the airplane trip to Alaska by Special Agent Harkabus) where he was placed in the Federal Jail under \$10,000 bail, taken out of the jail on at least two occasions by the same officers and driven around town for the purpose, as they stated, of having him identify places and events mentioned by him previously in the illegal confession. (Tr. 136.) Counsel for appellant's argument was that the whole reason for the rule would be destroyed if such actions on the part of officers were permitted and the decision in the *Mallory* and other Supreme Court cases would mean nothing. (Tr. 240.)

In excluding the confession the Court relied on a violation of Rule 5 and in addition ancillary facets such as the promises. (Tr. 247.)

The Court overruled the objection to allowing Territorial Police Officer Dankworth to testify concerning admissions made by appellant in Anchorage, Alaska. (Tr. 247.)

The witness Dankworth then took the stand and stated that he was employed by the Alaska Territorial Police and that he had occasion to talk with appellant on March 27, 1957. (Tr. 249.) The conversation took place in Territorial Police headquarters in Anchorage, Alaska, with appellant, Special Agent Harkabus, Detective Pass and Dankworth present. (Tr. 250, 256.) Over counsel for appellant's objection the witness Dankworth was permitted to repeat the conversation in full after being advised by the Court at the bench that he was to make no statement concerning a written confession. (Tr. 251.) Appellant's request

for a hearing on the admissibility of the evidence was denied. (Tr. 250.)

The witness Dankworth then testified that he was to interview the appellant with Special Agent Harkabus about a matter having nothing to do with the present case, that after the interview was concluded the appellant Smith then made a statement to the effect that he had been involved in the check cashing deal. (Tr. 252.) That he wanted to plead guilty, serve his time and did not want to be a stool pigeon. (Tr. 252.) The witness Dankworth then went on to repeat from memory a great portion of the matters contained in the confession obtained in Seattle although not in the same order as set out in the written confession itself.

The appellant was also in the custody of Detective Pass as well as Special Agent Harkabus at the time Dankworth reports he made the admissions which involve him in the same crime for which he was being tried. (Tr. 256.) According to the witness Dankworth all of the voluminous admissions made by the appellant Smith were volunteered spontaneously by Smith, or casually, after he had completed discussing the matter he was originally taken to Dankworth's office to discuss. (Tr. 256-257.) Dankworth did admit that he had discussed the matter with Mr. Plummer before going into Court. (Tr. 257.) Counsel for appellant moved to strike the testimony of the witness Dankworth. (Tr. 257.) The motion to strike was denied. (Tr. 264.) The Court gave as its reason the fact that although there may have been duress and coercion

used against appellant Smith prior to the time he was arraigned the fact that he was arraigned in Seattle and again before the United States Commissioner in Anchorage permitted the testimony by the officer of the admissions to be allowed into evidence. (Tr. 265.)

The testimony of Edward J. Harkabus, who plays a more important role in the particular points involved in this appeal than any other officer, reveals that he ordinarily resided in Fairbanks, Alaska. (Tr. 120.) He was called as a witness by the United States Attorney and testified that he saw the appellant Smith in Seattle on March 17, 1957 which was on Sunday and was asked the question whether the appellant Smith had made any statements to him, Harkabus, concerning Smith's participation in the Morrison-Knudsen check swindle. (Tr. 121.) Counsel for appellant objected, whereupon the Court excused the jury and agreed to try the admissibility of the signed statement made by appellant Smith. (Tr. 122.) Spectators were excluded from the courtroom. (Tr. 122.)

Harkabus then testified on direct that he was a special agent with the National Board of Fire Underwriters, saw the appellant in Seattle on March 17, 1957, interviewed him concerning the Morrison-Knudsen check swindle and during the interview appellant made statements concerning the matter. (Tr. 126.)

Harkabus volunteered on direct that during a portion of his interview with Smith, a Seattle attorney by the name of John Harris, a former assistant United States Attorney, was present; that Harris was

present for the purpose of representing Smith. (Tr. 126.)

On direct examination Harkabus testified that after appellant was arraigned in Anchorage on March 21, 1957 appellant was taken to U. S. Attorney Plummer's office and in Harkabus' presence and in Detective Pass's presence the United States Attorney went over the signed statement with appellant. Appellant was asked if he had any additional knowledge other than that set out in the statement; that the appellant stated no, that he wanted to plead guilty to the charge, begin service of his sentence and get it over with. (Tr. 134-135.)

Harkabus also testified that on March 27, 1957 he was present in Territorial Police headquarters with appellant, Detective Pass and Officer Dankworth of the Territorial Police when the conversation concerned appellant's written confession and that appellant at that time "reiterated the veracity of the statement". (Tr. 136.)

(Tr. 136): Harkabus admits that Sgt. Laird of the Territorial Police, Detective Pass and he, Harkabus, went over the statement with appellant Smith, took the appellant around in an automobile, asked that he point out the various locations of the roads mentioned in the statement.

On cross-examination Harkabus admitted that the first time he saw Smith in Seattle was on March 15, 1957 in Renton, Washington. Harkabus admitted that he accompanied the sheriff of King County and De-

tective Pass and Lt. Trafton in the police car to the home of appellant's mother and father. (Tr. 138.) Harkabus states that he thought Detective Pass had the warrant. (Tr. 139.) He says he did not look at the warrant in detail. His recollection is that he just gave it a passing glance but he thought the warrant was for forgery. (Tr. 139.)

Harkabus states that he was with the other three officers on March 15, 1957 because he wanted to interview Smith in connection with another matter, that he came down as a guard for the U. S. Marshal's office in Fairbanks. (Tr. 140.)

Harkabus did not read the warrant. (Tr. 140.) He says Detective Pass showed it to him but is not sure when this was done. (Tr. 140.) Harkabus admits that Weeland of the sheriff's office made a pretext call to Smith at his residence to determine whether he was at home. (Tr. 141.) When the police car drove up to the residence of appellant's mother and father, all the officers with the exception of Harkabus went to the rear door. (Tr. 141.) Harkabus says he got out of the car and walked toward the front fender, the car being parked in the front driveway near what would ordinarily be used as the front entrance. (Tr. 141.) Harkabus estimates the distance along the driveway from where he was standing to the point of the Smith residence where the three officers entered to arrest Smith as being approximately 50 feet. (Tr. 143.) Harkabus could not see the door the officers actually knocked at or entered, if they did enter. (Tr. 142.) Harkabus says he does believe he remembered hearing the

sheriff announce his identity. (Tr. 144.) He is not positive, however, and heard nothing else in connection with the arrest. (Tr. 144-145.)

Harkabus estimates that Smith was taken to the King County Jail at approximately 4:30 in the afternoon. (Tr. 147.) Harkabus says that Smith was immediately taken to be interviewed by Detective Pass and Lt. Trafton and that he, Harkabus, was in on the first part of the interview. He testifies, however, that he first questioned appellant on matters that concerned him (Harkabus) and took no further part in the interview that occurred on the day of the arrest. (Tr. 148.)

Harkabus testified that Detective Pass of the Anchorage Police Department advised appellant that he was entitled to counsel and that he need not make a statement at the commencement of the first interview. (Tr. 150.) He verifies appellant's statement that the Sunday interview was conducted by himself, Detective Pass and Lt. Trafton of the Territorial Police. (Tr. 151-152.) Harkabus, however, did most of the interrogating. Harkabus testifies that appellant had been in the interrogation room for about 45 minutes on Sunday, March 17th, when he admitted complicity in the crime with which he was charged. (Tr. 153.) Harkabus' testimony concerning appellant's attorney's attempt to contact appellant during the Sunday interview is contained in Tr. 153-161.

Appellant denies that he was arraigned before a commissioner in Seattle on the 19th day of March, 1957 and states that to the best of his recollection the

entire discussion in the Commissioner's room on that date was concerning the extradition papers he had signed. (Tr. 217.) Harkabus on the other hand testifies that appellant was arraigned in Seattle on March 18, 1957 before a Commissioner. (Tr. 172-174.) On the other hand and for some unknown reason the United States Attorney caused appellant to be arraigned on March 21, 1957 after his removal from Seattle to Anchorage, Alaska. The government's exhibit No. 23 for identification, which was never actually admitted into evidence (Supp. Tr. 294-295) so indicates.

Counsel for appellant objected to the admission into evidence of appellant's confession (Government's exhibit No. 20 for identification, Supp. Tr. 287). (Tr. 227.)

The Court rejected counsel for appellant's request that the Court convene out of the presence of the jury to determine the question of whether or not Territorial Police Officer Dankworth's testimony concerning appellant's admissions should be admitted. (Tr. 235.)

The Court overruled counsel for appellant's objection to the testimony of Officer Dankworth and counsel's request that a hearing be held in connection with the circumstances under which the evidence to be adduced from Officer Dankworth was obtained. (Tr. 250.)

After Dankworth's testimony had been given, counsel for appellant filed a written motion to strike the testimony and argued the merits of the motion to the

Court commencing at Tr. 258. The motion to strike was denied. (Tr. 264.)

During the United States Attorney's final argument to the jury the following occurred commencing on page 271 of the transcript:

"Now, there's also much innuendo about the reliability about the Government's evidence. I say, and you know, it's the only evidence you have. If they didn't feel that it was reliable, why didn't they put on some evidence? Why didn't they put some evidence on? You have no choice; you have no evidence or no testimony other than that adduced by the Government witnesses, and by the Government——

Mr. Kay. I hesitate to interrupt Mr. Plummer's argument, but I want to register an objection to that line of argument as tending to violate the constitutional right of the defendant (283) may have.

The Court. Well——

Mr. Plummer. I didn't mention anybody, except, why didn't they put on a defense.

The Court. That is correct. Objection overruled. If it had referred to an individual, then I would concur, Mr. Kay.

Mr. Kay. They refer to three individuals at this counsel table, and no one else.

The Court. Of course, that is true.

Mr. Plummer. I didn't say—may counsel approach the bench for just a moment?

The Court. I don't think it's necessary, counsel. Let's proceed.

Mr. Plummer. Fine. Now, also, I think . . ."

SPECIFICATIONS OF ERROR.

1. The trial Court erred in admitting the testimony of M. E. Dankworth, Territorial Police officer, containing admissions made by appellant while in custody without first holding a private hearing to determine whether the admissions had been voluntarily made. Such a hearing was denied.

2. The trial Court erred in admitting the testimony of M. E. Dankworth, Territorial Police officer, containing admissions made by appellant while still in the same custody and under the same pressures that existed when his confession was illegally obtained, the admissions containing the same information as the confession which was held to be inadmissible because, taken before prompt arraignment, upon promises of leniency and during a time when appellant was prevented from seeing his attorney.

3. The trial Court erred in refusing to instruct the jury that the admissions of appellant while in custody testified to by M. E. Dankworth must have been voluntarily made.

4. That the trial Court erred in refusing to strike the testimony of the witness M. E. Dankworth pursuant to timely motion by appellant.

5. That the U. S. Attorney committed reversible error in commenting on the failure of the appellant to take the witness stand and the trial Court erred in failing to properly instruct the jury after the U. S. Attorney's comments.

6. That the trial Court erred in refusing to permit appellant to inspect the confession taken from him

prior to its attempted introduction into evidence during the course of the trial.

SUMMARY OF ARGUMENT.

The trial Court was convinced that appellant was not timely arraigned and that duress and coercion were used and refused to admit the confession in evidence.

Counsel for appellant repeatedly pointed out to the Court that after the confession was illegally obtained, and while the appellant was still in custody under high bail without counsel and under the same pressures that brought about the illegal confession, the admissions verifying the illegal confession were obtained. Except for the illegal methods used to extract the confession and continued pressures there would never have been later admissions.

The admissions made under the circumstances were the fruits of the wrongdoing of the officers.

If evidence obtained in this fashion is held to be admissible then the effect of such Supreme Court decisions as the *McNabb*, *Carignan*, *Mallory* and *Nardone* cases is destroyed.

The Court refused to instruct the jury that the later admissions made by appellant while still in custody, under high bail and without counsel, which reiterated the contents of the illegal confession, must have been voluntarily made.

Appellant's objection to admission of the testimony of the Territorial Police officer who repeated

appellant's verification of the confession was overruled. Appellant's motion to strike that officer's testimony was denied.

The U. S. Attorney in closing argument committed reversible error in twice commenting on the failure of the defendants "to put some evidence on" which comments were emphasized by him again after objection was made by defense counsel. The trial judge then made matters worse by stating (in overruling the objection) that if the U. S. Attorney had referred to an "individual" then he would concur with defense counsel and (Tr. 270) in finally agreeing that the U. S. Attorney's references were to the "three individuals" (co-defendants) at counsel table.

The trial Court, in denying appellant's motion to inspect and photograph confessions, made under Rule 16, Federal Rules of Criminal Procedure, abused its discretion because the ruling was not based on the ground that the confessions were not material to the defense or that the request was unreasonable.

ARGUMENT.

SPECIFICATIONS 1 THROUGH 4.

Specifications 1 through 4 will be discussed together in the following argument.

Appellant's testimony contradicts that of Special Agent Harkabus in a few important particulars, otherwise their account of what happened commencing with the arrest and until appellant was released on bail is essentially the same.

Each point of contradiction, however, occurs over an important question of fact.

Harkabus maintained that there was a warrant in the possession of Detective Pass when the arrest was made. He didn't remember clearly where he saw it or what it said. Notice his testimony at Tr. 139-140, 146. Appellant's testimony on this point appears at Tr. 194, 213. The Court will note that the warrant that was supposed to have been used was issued at Anchorage, Alaska, on March 14, 1957. The arrest was made in Renton, Washington, at 3:00 P.M. March 15, 1957.

Harkabus insists appellant was informed of his rights by Detective Pass. (Tr. 148, 150.) Appellant's testimony on this point appears at Tr. 196-197, 211 and is a direct denial that he was ever informed that he needn't make a statement and that he could see an attorney.

Appellant's testimony on the matter of Attorney Harris' attempts to see him on Sunday, March 17th, are clear enough. (Tr. 200-204.) Harkabus' testimony on this point is found at Tr. 153-161 and is evasive to the point of being unintelligible in places and highly improbable otherwise.

Harkabus claims appellant was arraigned on Monday, March 18, 1957 (Tr. 173) and appellant denies this (Tr. 216-217), stating that the Seattle hearing was concerned mainly with extradition.

Why, if the alleged legal arraignments in Seattle actually took place on March 18, 1957, the appellant was again arraigned in Anchorage on March 21, 1957

was never clarified. Appellant's recollection of the Anchorage arraignment is very clear. (Tr. 209.)

The laboring oar for the Government was manned by the witness Harkabus who was not an officer of any Alaska law enforcement agency, but a special agent for the Board of Fire Underwriters. He was not present at the scene of the arrest according to his own testimony, took part in only some of the series of interrogations leading up to the confession, had no interest in the crime with which appellant was eventually charged and did not witness the confession. Yet, he testified with certainty that Detective Pass advised appellant of his rights, that appellant's arrest was without criticism, that a warrant was shown, that appellant confessed rather freely, had ample opportunity to confer with counsel and was properly arraigned in Seattle. He even attempted to volunteer to the Court what he apparently thought or had been told was a vital bit of evidence to the effect that Detective Pass had tried to arraign appellant on the day he was arrested. (Tr. 217.) Counsel for appellant was blamed by the Court for asking the question that elicited the information but an examination of the transcript will show that Harkabus volunteered the information.

All in all, Harkabus' activities in the case show him up to be a general agent of the Territory of Alaska rather than a special agent of the Board of Fire Underwriters—if all of his testimony can be believed. The trial Court observed him on the stand and did not give him enough credence to admit the written confession.

Regardless of whether the Seattle arraignment was a legal one or not, the fact remains that appellant was arrested at 3:00 P.M. Friday with no attempt being made to arraign him until Monday. The written confession was obtained after long hours of interrogation with appellant's attorney attempting to force his way into the interrogation room during the latter portion of this session.

After the hearing in Seattle we again find Harkabus in the picture riding side by side with appellant on the airplane trip to Anchorage and questioning him on the matters covered in the confession.

After arraignment in Anchorage on March 21st appellant was still confined in the Federal Jail under \$10,000 bail and without counsel. Again Harkabus is on the scene, leading appellant from jail and around town, in the company of other officers, for the purpose, as Harkabus put it, of identifying places mentioned in the confession with appellant being questioned by the officers regarding the confession.

On March 27th the appellant is supposed to have repeated practically verbatim the contents of the confession in the presence of Territorial Police Officer Dankworth. On this occasion appellant had been taken from jail by Harkabus, Pass and Sergeant Laird to point out places mentioned in the confession and in the course of the trip the party dropped into Territorial Police Headquarters where appellant was again questioned on the confession. According to Officer Dankworth appellant practically volunteered to repeat again everything that had been written in the

confession by Harkabus which he signed. The Court's attention is invited to the testimony of M. E. Dankworth commencing at Tr. 248; the repetition from memory by Dankworth of what appellant purportedly said almost a year previously at Tr. 253 and asked to compare Dankworth's statements with the confession itself. (Supp. Tr. 287.) And to consider Dankworth's statement at Tr. 257 to the effect that he had refreshed his recollection by discussing the case with Mr. Plummer (U. S. Attorney). It appears quite probable that Dankworth read the illegal confession again in Plummer's office before trial and was repeating it from a memory of that reading.

This testimony was admitted over appellant's objection. Appellant's demand for a hearing on the voluntariness of the alleged re-confession was denied as was the later motion to strike. Appellant requested that the question of the voluntariness of these statements be put to the jury and this request was denied. (See 2nd Supp. Transcript not printed as of this writing.)

Leyra v. Denno, Warden, 347 U.S. 556 (1954), came up from the New York State Courts and was decided on the Fourteenth Amendment. That case held that other confessions, made after the coerced confession, were not admissible. The principle of this case was considered and approved in *Burwell v. Teets*, 245 F. (2d) 154, 9th C.C.A. (1957), where the Court said at page 162:

"Of course, when an earlier confession has been coerced and a later one cannot be separated from the earlier one, and is but a continuation and

still the product of the earlier coercion, the later confession may not be used whether the first is excluded or not."

Although based on an interpretation of the leeway permitted by the Federal Communications Act (47 U.S.C. 605), the case of *Nardone v. U.S.*, 308 U.S. 38, 341, appears to be entirely applicable to this case. There the Court held that facts improperly obtained do not necessarily become sacred and inaccessible, if knowledge of them is gained from an independent source, but that knowledge gained by the Government's own wrongdoing cannot be used by it simply because it is used in a derivative manner. In *Silverthorne Lumber Co. Inc. et al. v. U.S.*, 251 U.S. 385, 392, it was held that the Fourth Amendment protects a corporation and its officers from compulsory production of the corporate books for use in a criminal proceeding against them where information upon which the subpoenas were framed was acquired by the Government through a previous unconstitutional search and seizure. The Court said at page 392:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely the evidence so acquired shall not be used before the Court but that it shall not be used at all."

There appears to be no question but that Rule 5a of the Federal Rules of Criminal Procedure was violated and the ruling of the trial Court based on *McJabb v. U.S.*, 318 U.S. 332, and *Mallory v. U.S.*, 354 U.S. 449, excluding the confession was correct.

Can the illegal confession then be used by the same officers as a means to pry from the defendant reiteration of the confession, after arraignment, and thus purify the same evidence?

If so, then Rule 5a of the Federal Rules of Criminal Procedure no longer has any force or meaning. A legal means of circumventing the rule has been established. No informed officer would bother to cause arraignment "without unnecessary delay". The officer would stand a better chance of "making his case" if he immediately commenced interrogation in the hope of getting a confession and then purifying the confession, so to speak, in the filter of what would then be meaningless procedure as far as the defendant was concerned.

The words "Not until he had confessed, when any judicial caution had lost its purpose, did the police arraign him" (*Mallory v. U.S.*) would become a standard rule of operation for informed officers. Why shouldn't a conscientious officer be thus guided if such procedure is held to be legal?

There is no question but what the chances of obtaining a confession are increased if arraignment is deferred for questioning. Once a confession has been obtained the defendant stands naked before the officers. Arraignment then has little or no meaning to him in his despair. What purpose is served by informing him that he need not make a statement when he has already stated everything with the encouragement of the arresting officer? What can it mean to the defendant in this predicament to advise him that he is

entitled to counsel, when he knows, or thinks he knows, that there is nothing that counsel can do to save him now? Or to tell him that anything he says might be used against him when he knows that he has already said everything and is by that time only wondering what his fate will be?

Would it be difficult for the same officers then, on the pretext of discussing some part of the confession with the defendant, to get another admission of its veracity? Our knowledge of human nature tells us no. The bars of protection, once lowered, are down forever.

Rationalizing to permit the use of evidence procured and purified in this manner destroys the protection intended by Rule 5 of the Federal Rules of Criminal Procedure and the Constitution. The intent was to give the accused an arraignment when it would mean something to him and prevent abuses by arresting officers.

THAT THE U. S. ATTORNEY COMMITTED REVERSIBLE ERROR IN COMMENTING ON THE FAILURE OF THE APPELLANT TO TAKE THE WITNESS STAND AND THE TRIAL COURT ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY AFTER THE U. S. ATTORNEY'S COMMENTS.

An examination of the authorities on this point discloses that while most Courts recognize the rule that the prosecuting attorney shall not comment on the failure of a defendant to take the witness stand in his own behalf and call such comments "grave error", generally in the cases reported and examined

by the writer the decisions have generally found some reason to condone the alleged objectionable remarks. Either because defense counsel had himself provoked the prosecuting attorney's comments or on the particular peculiar facts of the case.

In *Wilson v. U.S.*, 149 U.S. 60, the prosecuting attorney in his enthusiasm said:

"If I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go on the stand, and hold up my hand before high heaven, and testify to my innocence of that crime."

The above comments were held to be a violation of the defendant's constitutional rights. On the other hand, in *Jackson v. U.S.*, 102 Fed. 473, 487 (C.C.A. 9th), the comment, "Why didn't the defendant put a sworn witness on the stand" was held not to be construed as a comment on defendant's failure to testify.

In this case the District Attorney said:

"Now, there is also much innuendo about the reliability about the Government's evidence. I say, and you know, it's the only evidence you have. If they didn't feel that it was reliable, why didn't they put on some evidence? Why didn't they put some evidence on? You have no choice; you have no evidence or no testimony other than that adduced by the Government witnesses, and by the Government . . ." (Tr. 271.)

From the authorities examined it would appear that the comment, "Why didn't they put on some evidence? Why didn't they put some evidence on?"

could not be held to be a violation of the defendant's constitutional rights.

However, it will be observed from an examination of the transcript that the U. S. Attorney was still talking when interrupted with an objection. The line of argument being pursued by the U. S. Attorney would easily, and would ordinarily, cause an alert defense counsel to expect further and possibly even more pointed comments on the subject. Defense counsel's only alternative is to object to the line of argument in the hope that it would stop before reversible error was committed. This is exactly what defense counsel Kay did when he said:

"Mr. Kay. I hesitate to interrupt Mr. Plummer's argument, but I want to register an objection to that line of argument as tending to violate the constitutional right the defendant may have."

If the Court had overruled the objection at that point, the authorities would no doubt sustain the ruling. The Court commenced to speak and the transcript shows the following occurred:

"The Court. Well——"

Instead of permitting the Court to rule, Mr. Plummer, in his enthusiasm, had to break in or interrupt and say:

"Mr. Plummer. I didn't mention *anybody*, except, why didn't they put on a defense." (Emphasis supplied.)

Instead of allowing the Court to rule, Mr. Plummer has to point out to the Court, and the jury, that

no *person* was mentioned. Then, instead of making the ruling that had previously been interrupted or prevented by Mr. Plummer, the Court says:

“The Court. That is correct. Objection overruled. If it had referred to an *individual*, then I would concur, Mr. Kay.” (Emphasis supplied.)

Now the Court has to join with Mr. Plummer in pointing out to Mr. Kay, and incidentally to the jury, that no individual was named by Mr. Plummer in his argument, but that if he had mentioned an individual then the Court would concur with Mr. Kay. Instead of just overruling the objection the Court has to explain in the presence of the jury the actual limits of the rule.

This comment by the Court then provoked the following comment by Mr. Kay:

“Mr. Kay. They referred to the three individuals at this counsel table and no one else.”

Mr. Kay’s comment was obviously provoked by the Court in using the word “individual” in the first place and represents the ultimate that Mr. Kay can do under the circumstances to point out to the Court the error of his ruling. The Court then indicates that actually, in the Court’s own mind, Mr. Plummer had been referring to the three individuals at defense counsel tables in the first place by saying:

“The Court. Of course, that is true.”

Judge McCarrey was thoroughly frank about the whole matter, to say the least. To have denied the truth of Mr. Kay’s analysis when he actually personally thought otherwise would have been intellectual

dishonesty on a matter where an accused's constitutional rights were being decided. However, even though the discussion had gone too far to be saved by an instruction to the jury, and not because of defense counsel Kay's original objection, the Court failed to attempt to correct the matter in any fashion whatsoever. The Court's failure to insist upon ruling in the first place without interruption from Mr. Plummer turns out to have been a mistake. Mr. Plummer's insistence in pointing out to the Court how right he was aggravates his original mistake, that of interrupting the Judge. The Judge then compounds the errors after ruling, by attempting to explain his ruling and then finally, in effect, admits that Mr. Kay was right in the first place.

It is submitted that on the particular and peculiar facts here presented this Court should rule that reversible error was committed.

THAT THE TRIAL COURT ERRED IN REFUSING TO PERMIT APPELLANT TO INSPECT THE CONFESSION TAKEN FROM HIM PRIOR TO ITS ATTEMPTED INTRODUCTION INTO EVIDENCE DURING THE COURSE OF THE TRIAL.

The appellant's motion was based on Rule 16 of the Federal Rules of Criminal Procedure which reads as follows:

"Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the Government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to

the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions that are just."

It is conceded that probably the *numerical* weight of the decisions construing this rule is that a defendant cannot require the Government to furnish him, prior to trial, with a copy of his statement or confession. Barron, Federal Practice and Procedure, Volume 4, Sec. 2032, pages 126-127.

Many of the decisions are based on the reasoning that a confession is not a paper, document or tangible object, obtained from or belonging to the defendant. *U.S. v. Black*, D.C. Ind., 6 FRD 270, 1946.

Another reason given is that discovery in criminal proceedings is limited and was intended to be limited because of the nature of the issues, the danger of intimidation of witnesses and the still greater danger of perjury and subornation of perjury. *U.S. v. Malinsky*, D.C. N.Y., 19 FRD 426, 1956.

Most of the decisions seem to agree that the granting or denying of a motion to produce and permit inspection of a statement or confession lies in the discretion of the trial Court. Presumably, from the wording of the rule, the discretion of the trial Court should be exercised with respect to two considerations, namely:

1. Whether the item sought is material to the preparation of the defense.
2. Whether the request is reasonable.

No decision was discovered by the writer which held that the trial Court had abused its discretion in refusing to permit the discovery requested. However, it is pointed out, the main body of the decisions on the subject have not been appealed.

In arguing the motions to produce in this case commencing at page 34 of the transcript it appears that defense counsel Kay mistakenly argued the case of *Monroe v. U.S.* 234 F. (2d) 49, as being a decision of the Ninth Circuit Court of Appeals. This decision actually was from the Circuit Court of Appeals for the District of Columbia in 1956. The case does seem to hold, however, that pretrial discovery would have been permitted with respect to the recordings involved if the defense had not already been permitted to inspect before the motion was actually made.

No cases were discovered by the writer which based the refusal to permit discovery strictly on the grounds that the items sought were not material to the preparation of a defense and that the request made was actually unreasonable.

In the writer's opinion too many of the cases are based on reasoning such as is contained in *Shores v. U.S.*, 174 F. (2d) 838, 843, to the effect that the rule can't possibly mean what it says. In that case the court said in its decision at page 843:

"In a general sense, of course, a confession may be regarded as a paper or document 'obtained'

from the defendant, but reading the language of the rule in the light of the history involved in its formation and in its context, we do not believe that such was its intended legal connotation and purpose here.”

The decision then goes on to justify its ruling by discussing the Notes of the Advisory Committee. Other decisions examined by the writer have done the same.

Judge McCarrey in ruling on the motions in this case was likewise guided by the Advisory Committee. (Tr. 51.) His decision appeared to be based on the case of *U.S. v. Black*, 6 FRD 270. It is significant, however, that nowhere in the discussion of the motions and argument by defense counsel and the U. S. Attorney was it contended that the confessions were not material to the preparation of a defense nor that the requests made were unreasonable.

It would appear from a reading of Rule 16 that a denial of discovery would be an abuse of discretion unless the Court based its refusal on one or the other of the two grounds for refusal.

In this case the copies of the confession were signed by the appellant while in the Federal Jail in Seattle under circumstances previously outlined. Not once in ten thousand times would an accused under the circumstances demand a copy of the confession as a condition to signing it, yet it would seem that once the accused signed his name to the confession that it would belong to him. Others may have performed to cause writing to appear on the paper, but such writing

meaningless and certainly is not a confession until the accused has taken the paper in hand and endorsed his signature. At that moment a document comes into being which can properly be called a confession. The confession is then taken from the defendant by the officers. This would appear to fall exactly within the wording of the rule as a paper or document "obtained from" the defendant, and is entirely consistent with the reasoning in the *Shores* case cited above.

The Court's attention is respectfully invited to the case of *U.S. v. Klein, et al.*, D.C., S.D. N.Y., 18 F.R.D. 439, 1955, where the defendant sought discovery and inspection of statements voluntarily made to government agents which were transcribed by a stenographer. Judge Sugarman had no trouble at all in a very short opinion in finding that the requisites of Rule 16 were satisfied in that the statements were "obtained from" the defendant; are "material to the preparation of his defense" and the request was "reasonable".

It is submitted that since no argument was made to the U. S. Attorney that the items sought were not material to the defense or that the requests were unreasonable and since the ruling of the Court was not based on either of these points that the trial Court was guided entirely by precedent and not by the wording of the rule.

Dated, Anchorage, Alaska,
November 17, 1958.

Respectfully submitted,

BUELL A. NESBETT,

Attorney for Appellant.

No. 16,041

United States Court of Appeals
For the Ninth Circuit

CHARLES E. SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF FOR APPELLEE.

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FILE

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PAUL P. O'BRIEN



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No. 16,041

United States Court of Appeals For the Ninth Circuit

CHARLES E. SMITH,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

On October 29, 1957, the appellant was indicted by the Grand Jury for the Third Judicial Division, District of Alaska, along with James Burton Ing, Raymond Wright, John Walker, Dewey Taylor and Lemuel Ashley Williams in a twenty count Indictment charging the defendants with uttering and publishing forged checks in violation of Section 65-6-1 ACLA 1949 (R 3-22). The appellant was named in Counts I through V only. The trial of the appellant was completed on February 28, 1958. The appellant was found guilty on Counts I, III, IV and V, and not guilty on Count II (R 24). On March 3, 1958,

appellant was sentenced to imprisonment for five years on each of the four counts of which he was convicted to run concurrently, with two years suspended on condition he make restitution (R 25, 26).

The trial Court had jurisdiction of the Indictment and trial under the provisions of Sections 53-1-1, 53-2-1, 65-6-1 ACLA 1949. Jurisdiction is conferred on this Court by Sections 1291 and 1294, Title 28, U.S.C.

STATEMENT OF FACTS AND PROCEDURE.

On Thursday, March 14, 1957, a complaint was filed by the United States Attorney in the office of the United States Commissioner, District of Alaska, Anchorage Precinct, Anchorage, Alaska, charging the appellant of the crime of forging and uttering a forged instrument, in violation of Section 65-6-2 ACLA 1949 (R 295, 296, 297). A warrant for the appellant's arrest was issued on the same day (R 294). The appellant was arrested at his parents' home in Renton, Washington, at about 3:30 P.M. on March 15, 1957 (R 137-147). A Lt. Wayland of the King County, Washington, Sheriff's Office, Lt. William Trafton, Territorial Police Officer, Special Deputy Marshal Ted Pass, and Edward J. Harkabus, a special agent for the National Board of Fire Underwriters, were present when the appellant was taken into custody (R 138). The appellant arrived at the King County Jail about 4:30 P.M. (R 147). The appellant was interviewed briefly by Officers Trafton and Pass at the King County Sheriff's Office on Fri-

day, March 15, 1957 (R. 147). The appellant was warned that he did not have to make a statement and that he was entitled to the services of an attorney by Officer Pass (R 148, 150). Appellant apparently signed a waiver of extradition around 6:00 P.M. on Friday evening. The appellant testified that he was interviewed by Officers Trafton and Pass for about one hour on Saturday, March 16, 1957 (R 198, 199). Although not clear, there is some indication that there was an attempt on March 16, 1957, to arraign the appellant (R 174). On Sunday, March 17, at about 2:00 P.M., appellant was interviewed by Trafton, Pass and Harkabus at the King County Jail (R 151, 152). No threats or promises were made by any of the officers to the appellant (R 132). About 45 minutes after the interview began, the appellant made his first admission (R 153). The appellant had a conference with Mr. Harris, an attorney retained by the appellant's father, on Sunday afternoon prior to signing his statement (R 159, 160). The appellant admitted he signed nothing until he saw his attorney (R 204). The appellant told Mr. Harris that he didn't care to talk to him in private (R 160). The appellant admitted that no one prevented him from requesting a private conference with his attorney (R 210). Later in the afternoon, the appellant's statement (Pl.Ex. 20) was typed by Mr. Harkabus and was signed by the appellant (R 163), after reading over the statement and making corrections (R 164). The appellant was arraigned in Seattle by United States Commissioner John Burns on Monday, March 18, 1957, on the

complaint filed in Anchorage (R 173, 299, 300, 301). At the arraignment in Seattle, the appellant was represented by counsel. The complaint was read and explained to him (R 173, 300). The appellant was released to Alaskan authorities and returned to Anchorage where he was again arraigned by a United States Commissioner on March 21, 1957. The Commissioner read the complaint to the appellant and advised him of his rights (R 294, 295). At this hearing, the appellant waived preliminary hearing (R 295).

On March 27, 1957, the appellant was interviewed by Officer Dankworth at the Territorial Police Office in Anchorage concerning another matter (R 249). At this interview, the appellant volunteered certain oral statements to Mr. Dankworth concerning his implication in the crimes of which he was convicted (R 252-255). The appellant told Mr. Dankworth at this interview that he desired to plead guilty (R 252).

At the trial, the appellant objected to the admission of Plaintiff's Exhibit 20 for identification (R 121). The trial Judge sustained the objection on the ground that Rule 5 of the Federal Rules of Criminal Procedure had been violated, for the reason that four days had elapsed since the date of arrest and the date of first arraignment (R 227). The appellant objected to the testimony of Mr. Dankworth concerning the oral admissions made by the appellant on March 27, 1957. The Court overruled this objection (R 250). The appellant made a motion to strike the testimony of Mr. Dankworth (R 257) which was denied by the Court (R 264, 265).

The attorney for the appellant said, in a hearing on the instructions, the following:

“Only your Honor, to except to the failure of the Court to give any instruction to the effect that admissions made by a defendant while in custody must be voluntarily and that the burden of proving the voluntary nature of the statements is on the government and I realize I didn’t submit one on those points, your Honor, and—well, that is all I have to say.” (R 334)

The Court instructed that the testimony of the oral admissions of a party should be viewed with caution (R 327).

The appellant, prior to trial, moved under the provisions of Rule 16, Federal Rules of Criminal Procedure, for inspection of his written statement (Plaintiff’s Exhibit 20 for identification). The Court denied the appellant’s motion (R 51).

During closing argument, the United States Attorney stated (R 271):

“... Now there’s also much innuendo about the reliability about the Government’s evidence. I say, and you know, it’s the only evidence you have. If they didn’t feel that it was reliable, why didn’t they put on some evidence? Why didn’t they put some evidence on? You have no choice; you have no evidence or no testimony other than that adduced by the Government witnesses, and by the Government ...”

The counsel for the defendant, Ing, objected to the remarks (R 271). This objection was overruled (R 271).

ARGUMENT.

- I. THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF OFFICER DANKWORTH CONTAINING ADMISSIONS MADE BY APPELLANT ON MARCH 27, 1957.
- A. The trial Court erred in refusing to admit Plaintiff's Exhibit 20 for identification as having been taken in violation of Rule 5(a), Federal Rules of Criminal Procedure.

The appellant contends in his brief (pp. 22-29) that Plaintiff's Exhibit 20 for identification was taken in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. From that point, he argues that the oral admissions made some ten days after the first statement were the fruits of his allegedly inadmissible statement. In this regard, he tries to rely on the *McNabb*, *Carignan*, *Leyra v. Denno*, *Silverthorne Lumber Co.*, *Mallory* and *Nardone* cases, among others, to establish his contention.

A careful examination and analysis of the authorities relied upon by the appellant in his brief reveal that they do not support his contention as applied to the facts in the instant case. In the case of *McNabb v. United States*, 318 U.S. 332, 345 (1943), the Court stated:

“ . . . The mere fact that a confession is made while in custody of police does not render it inadmissible . . . ”

In the *McNabb* case, *supra*, the defendants were arrested without a warrant, brought to a bare detention room in the Federal Building where they could neither sit nor lie down for about 14 hours, from 3:00 A.M. until 5:00 P.M. in the afternoon. They were not permitted to see relatives and friends who attempted to visit them. They had no lawyer. There was no evidence that they

requested assistance of counsel, or that they were told that they were entitled to such assistance. The questioning by six officers continued until 2:00 A.M. Saturday morning. In that case, it was obvious that the defendants could have been arraigned promptly and were not. In the case at bar, the appellant was promptly informed of his rights and advised that he was entitled to the services of an attorney (R 148, 150). The appellant was arrested pursuant to a warrant signed by the United States Commissioner (R 294). The appellant apparently received legal advice before signing his statement (R 159, 160, 204). The appellant was arraigned in Seattle during normal business hours and again advised of his rights and had assistance of counsel (R 173, 299, 300, 301). The record is devoid of any coercion or prolonged questioning or third degree methods. The *McNabb* case could not be applied to the facts here under any logical stretch of one's imagination.

In *United States v. Carignan*, 342 U.S. 36 (1951), referred to by appellant on page 21 of his brief, the Court reversed this Court in part in a case of Alaskan origin by refusing to extend the *McNabb* rule to interrogation conducted while the defendant was in legal custody. It would appear that this case supports the contention of the government that it was error for the trial Judge to exclude the appellant's confession.

The appellant relies heavily on the case of *Mallory v. United States*, 354 U.S. 449, 450 (1957). In that case, the defendant was arrested, apparently without a warrant, early in the afternoon and was detained at police headquarters within the vicinity of numerous

committing magistrates. He was not warned of his right to remain silent or advised that he had right to counsel. In this case, the appellant has made no showing that he could have been arraigned before Monday. In this case, the appellant was warned of his rights at the outset and had advice of counsel.

The appellant cites the case of *Leyra v. Denno, Warden*, 347 U.S. 556, 561 (1954). In that case, the Supreme Court found that a subsequent confession taken by state authorities within five hours after an admittedly coerced and involuntary confession taken by state authorities violated the due process clause of the Fourteenth Amendment. The defendant had been questioned for days and nights for a period of nearly five days without counsel. A psychiatrist, paid by the state, posing as a general practitioner to treat the defendant's sinus condition, utilized methods approaching mental coercion, finally obtained a confession from the defendant. Justice Black described the subsequent statement as follows:

“ . . . All were simply parts of one continuous process. All were extracted in the same place within a period of about five hours as the climax of days and nights of intermittent, intensive police questioning. First, an already physically and emotionally exhausted suspect's ability to resist interrogation was broken to almost trance-like submission by use of the arts of a highly skilled psychiatrist. Then the confession petitioner began making to the psychiatrist was filled in and perfected by additional statements given in rapid succession to a police officer, a trusted friend, and two state prosecutors. We hold that use of con-

fessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our Constitution . . .”

In the instant case, there was an interval of ten days, rather than five hours, between the first allegedly inadmissible statement and the subsequent admissions. In this interval, the appellant was represented by counsel and was repeatedly warned of his rights. He nevertheless volunteered the admissions at an interrogation involving another matter.

The appellant attempts to stretch the decision of the Supreme Court in *Nardone v. United States*, 308 U.S. 338, 341 (1939), to apply to the instant case. The poisonous tree doctrine relating to evidence obtained in violation of Section 605 of the Communications Act of 1934 is not applicable to the facts here and should not be extended beyond its factual context. Justice Frankfurter, in the opinion of the Court, stated as follows:

“Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government’s proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation—fair to the intendment of Section 605, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court’s satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly

done here—the trial Judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin . . .”

Even if this Court sees fit to extend *Nardone* beyond its factual context, it would appear that the influence of the first confession was so diminished after legal advice and two arraignments as to have no causal connection whatever with the admissions objected to.

The case of *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), cited by the appellant, does not apply to subsequent admissions, but rather applies to fruits of an illegal search and seizure. This case is not in point and inapplicable here.

The case of *Burwell v. Teets*, 245 F.2d 154 (9th Cir. 1957), cited for its language by the appellant, does not support his contention. This Court, at page 163, found that the confession taken subsequent to the alleged coerced confession made the night before was not part of a continuous process. It should be noted that the prior statements were found to be voluntary.

It is respectfully submitted that the ruling of the lower Court in refusing to admit the appellant's written confession was error. The trial judge failed to comprehend the true and full meaning of Rule 5(a) and the decisions thereunder. In this connection, it should be noted that no proof was presented by the appellant that the appellant could have been arraigned

and that a Commissioner was available for that purpose. Also, the trial Court ignored the fact that the appellant consulted counsel before signing his statement, was warned of his rights, and that there was no duress or third degree methods employed. The government respectfully submits that the appellant was arraigned during normal business hours of the United States Commissioner in Seattle. Moreover, the trial Court failed to recognize that the appellant was arrested on a warrant duly issued.

To determine the true meaning of Rule 5(a), we invite the Court's attention to subsequent authority. This Court, in the case of *Symons v. United States*, 178 F.2d 615, 621 (1950), stated:

"... Rule 5(a) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., requires any person making an arrest without a warrant to take the arrested person without unnecessary delay before the nearest available commissioner. We are not aware of any rule or decision which requires a commissioner to make himself available at all hours of the night for the purpose of hearing evidence against a person arrested by federal officers without a warrant. We do not construe the words 'without unnecessary delay' to require that the arrested person be taken before a commissioner except during his regular office hours ..."

In the recent case of *Porter v. United States*, 258 F.2d 685, 688, 689 (D.C. Cir. 1958), Mr. Justice Reed, in an extended discussion of the *Mallory* decision and Rule 5(a), stated:

"The statutory direction to 'produce a prisoner before a magistrate without unnecessary delay' is

not a measure as definitive as the standard yard. It did have a background of interpretation, however, when it appeared in the Rules. 'Without unnecessary delay' had been used in New York at least since 1887, Code of Criminal Procedure, Section 165, and in Illinois since 1874, Smith-Hurd Criminal Code, Section 660. Disregard of the duty of arraignment, it was held in *People v. Mummiani*, 258 N.Y. 394, 396, 180 N.E. 94, 95, 'does not avail, however, without more to invalidate an intermediate confession.' *People v. Alex*, 265 N.Y. 192, 194, 192 N.E. 289, 94 A.L.R. 1033. Of course, evidence of illegal detention is admissible on the question of coercion. *People v. Elmore*, 277 N.Y. 397, 14 N.E.2d 451, 124 A.L.R. 465. Thus they differ from the federal rule.

Both New York and Illinois recognize that the rule for production 'without unnecessary delay' is during the ordinary professional hours of commissioners and judges.

'Furthermore, his detention was not unlawful, for section 7, of division 6 of the Criminal Code, Ill. Rev. Stat. 1947, Chap. 38, par. 660, does not require that courts of committing magistrates shall be open on Saturday night, Sunday, and Sunday night in order to enable peace officers to bring an arrested person before one for arraignment when, during all that time, the crime committed has not been fully solved in respect to the identity of other participants, and the arrested person's connection therewith is still under investigation.'

This is the view of the Supreme Court, *Mallory v. United States*, 354 U.S. at page 453, 77 S.Ct. at page 1359. Police detention was willful dis-

obedience of law 'when a committing magistrate was readily accessible.'

We turn now to the application to this case of these rulings. The people and courts of this nation are one in their desire to support police efforts to detect and punish crime, and equally concerned with assuring a defendant of a fair and just trial. The value in enforcement of careful interrogation of suspects is recognized and encouraged until such time as a suspect is taken into custody. The danger of alarm to accomplices or flight by suspects before arrest complicates such preliminary investigations. On arrest the prisoner must be taken before any reasonably accessible magistrate without unnecessary delay. But until there is such an opportunity to reach such an official, the Supreme Court has not held reasonable questioning without more of prisoners must cease. Each case depends upon its own facts as to what is or is not unnecessary delay. . . ."

Justice Reed, who was a retired member of the Supreme Court when the *Mallory* decision was handed down, takes the position that "without unnecessary delay" means that arraignment must take place during ordinary professional hours of commissioners and judges. This reasoning is almost identical with that of this Court in the *Symons* case, *supra*.

Judge Holtzoff clarifies the meaning of "without unnecessary delay" in Rule 5(a) in the recent case of *United States v. Heideman*, 21 F.R.D. 335, 336 (D.C. D.C. 1958) when he said:

"It so happens that I was a member and the Secretary of the Advisory Committee appointed by

the Supreme Court to prepare a draft of the Federal Rules of Criminal Procedure. The records of the Committee will show that the words 'without unnecessary delay' were deliberately chosen and were not to be taken as synonymous with 'immediately' or 'forthwith'. The notes of the Advisory Committee appended to the Rules disclose the intent of the Committee. To be sure, they are not binding on the Supreme Court, but they fulfill the same analogous role as that played by a Congressional Committee report in determining what the Congressional intent was in framing a statute. The notes of the Advisory Committee indicate that the words 'without unnecessary delay' were used as equivalent to 'reasonable time'. The notes cite a number of authorities which discuss the question what constitutes a reasonable time for the purpose of bringing a defendant before a committing magistrate. Some of these authorities sanction a much longer interval of time than is involved in this case."

- B. Even if the appellant's written confession was taken in such a fashion as to be inadmissible under Rule 5(a) of the Federal Rules of Criminal Procedure, the oral admissions made by appellant on March 27, 1957, were not the product of the earlier confession.**

The record shows that the appellant was arraigned twice, once on March 18, 1957, in Seattle, and again in Anchorage on March 21, 1957. At the earlier arraignment, the appellant was represented by an attorney. At both proceedings, he was advised of his rights and the complaint was read to him. On March 27, 1957, the appellant, during an investigation of another matter, volunteered the admissions in question

to Mr. Dankworth and stated that he desired to plead guilty (R 252). From the record, it appears that there is no causal relationship between the first statement and the one in question. Nearly ten days had elapsed between the two statements. Representation by counsel plus two arraignments defy the argument of appellant that these admissions were tainted. None of the cases cited by the appellant apply to this case. Where the subsequent statement was excluded, it was part of a continuous and uninterrupted chain made shortly after the first statement. Here that chain was clearly broken.

II. THE TRIAL COURT DID NOT ERR IN REFUSING A PRIVATE HEARING TO DETERMINE WHETHER THE ADMISSIONS WERE VOLUNTARILY MADE.

No discussion is made by the appellant of specification of error number two. It would be most enlightening to know on what authority he bases his contention that a hearing is necessary to determine the admissibility of the oral admissions in question. From his brief, it appears that he is relying on his contention that the first statement which he alleges is inadmissible as a violation of Rule 5(a) of Federal Rules of Criminal Procedure produced these admissions. It should be noted that a full hearing was had on that matter (R 131-220). At that hearing, the appellant testified fully as to the circumstances surrounding his first statement. The record is devoid of any offer of proof made by the appellant to show any additional information. The trial Judge allowed a hearing on the

appellant's motion to strike Mr. Dankworth's testimony. For the reasons stated, the appellant's designation is without merit.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THAT THE ADMISSIONS OF THE APPELLANT MUST HAVE BEEN VOLUNTARILY MADE.

The appellant does not discuss specification of error number three in his brief. At trial, the appellant's counsel did not present an instruction covering the voluntary nature of an admission (R 334). The Court instructed that the testimony of oral admissions of a party should be received with caution (R 327). The language of *Morton v. United States*, 147 F. 2d 28, 31, 32 (D.C. Cir. 1945) indicates that no instruction was necessary on the voluntary nature of an admission, that being a question of law for the Court.

No proper request was made by appellant for such an instruction and therefore, any error which might arise was waived. Since the admissibility of the admission is a question of law at best, it was not a question for the jury and no instruction was necessary.

IV. THE TRIAL COURT DID NOT ERR IN REFUSING TO STRIKE TESTIMONY OF OFFICER DANKWORTH.

This is covered in Point I above.

V. THE REMARKS OF THE UNITED STATES ATTORNEY IN
CLOSING ARGUMENT WAS NOT ERROR.

At page 271 of the record, you will find the following comments of the United States Attorney made in final argument:

“Now, there’s also much innuendo about the reliability about the Government’s evidence. I say, and you know, it’s the only evidence you have. If they didn’t feel that it was reliable, why didn’t they put on some evidence? Why didn’t they put some evidence on? You have no choice; you have no evidence or no testimony other than that adduced by the Government witnesses, and by the Government.”

The attorney for the defendant Ing immediately interposed an objection (R 271). The Court overruled the objection (R 271). At that point Mr. Kay stated:

“They refer to three individuals at this counsel table, and no one else.”

No requested instructions to disregard the comments of the District Attorney was made by any of the counsel.

The comments of the District Attorney could not be construed as a comment on the failure of the appellant to take the stand. Any error that was induced was induced by the comments of the counsel for the defendant Ing, in calling to the Court’s attention in the presence of the Jury that the comment referred to the three defendants. It appears that the attorneys for the three co-defendants agreed and the Court ap-

proved that the objection of one counsel would constitute objections for the three defendants on trial (R 57). An examination of the authorities in this area would seem to indicate that the remarks of the United States Attorney in this instance would be proper. In the case of *Johnson v. United States*, 5 F.2d 471, 475 (4th Cir. 1925), the Court states:

“The defendants complain that in argument the counsel for the government called the attention of the jury to the fact that neither of the defendants had seen fit to take the stand in his own behalf. It does not appear that anything of the kind was done. In enumerating the questions that the jury would have to consider one of the counsel for the government said: ‘What is the evidence introduced by the government? Does that evidence tend to prove these men guilty beyond a reasonable doubt? What is the defense offered on their behalf?’ At another time, he said: ‘Is there any evidence to show that’ (a couple of the government witnesses, naming them) ‘were not here in the latter part of March or the 1st of April, and that they did not get the alcohol as they were directed? That is the one thing upon which there has been no apparent contradictions.’ Then, again, another one of the counsel for the government said: ‘I want to call your attention to this opening statement of counsel. And now after the government has presented to you what I think is the strongest case that was ever made out against a man, we have in defense of that only the evidence of the good reputation of some of these defendants.’ We see in this nothing but a fair and accurate statement of what had taken place, and there is nothing in the quoted language to

sustain the contention that the government in any way called the attention of the jury to the fact that the defendants did not take the stand."

In the case of *Slakoff v. United States*, 8 F.2d 9, 11 (3rd Cir. 1925), the Court states:

"... When the entire statement of the prosecutor amounts merely to an argument that the evidence of the government is uncontradicted and unexplained, without necessarily calling attention to defendant's failure to testify, it is not ground for reversal ..."

In the case of *Lias v. United States*, 51 F.2d 215 at 218 (4th Cir. 1931), the Court held that comment by counsel to the effect that the Government evidence was uncontradicted is not error. See also *Jamail v. United States*, 55 F.2d 216, 217 (5th Cir. 1932); *Bradley v. United States*, 254 Fed. 289, 291 (8th Cir. 1918); *Hunt v. United States*, 231 F.2d 784, 785 (8th Cir. 1956); *State v. O'Brien*, 77 So. 2d 402, 405 (La. 1954); *Banks v. United States*, 204 F.2d 666 (8th Cir. 1953).

In the case of *Hood v. United States*, 59 F.2d 153, 155 (10th Cir. 1932), the prosecutor in final argument stated:

"... Who says he didn't do it? Who denies ...".

The Court disposed of the appellant's objection to the language stated above as follows:

"... This is not tantamount to an assertion that the defendant did not testify to the denial of the transactions. To so construe the remarks it must

have been plain that only the defendant could have disputed the testimony for the government . . .”.

In the case of *Morgan v. United States*, 31 F.2d 385, 388 (7th Cir. 1929) the Court held that the following comments of the prosecutor were proper:

“What is it counsel wants the Government to produce in his criticism of me in the presentation of this case? What does he want me to do? Does he want me to call Hust and Morgan to the stand before you gentlemen and have them tell you what? No; the criminal laws don’t permit it.”

In the case of *Lefkowitz v. United States*, 273 Fed. 664, 668 (2nd Cir. 1921), the Court stated:

“It is only objectionable to comment upon the failure of the defendant personally to testify, and if at the close of the whole case any given point stands uncontradicted, such lack of contradiction is a fact, an obvious truth, upon which counsel are entirely at liberty to dwell. We perceive nothing objectionable on the part of this prosecutor.”

In the *Lefkowitz* case, *supra*, the prosecutor stated that certain evidence of the Government was uncontradicted and undenied. Yet the Court found that these statements were proper.

In the case of *Jackson v. United States*, 102 Fed. 473, 487 (1900), this Court stated that the following comment of the prosecutor in argument was not error:

“Why didn’t the defendant put a sworn witness on the stand?”

In the *Jackson* case, *supra*, this Court stated that the language described above does not necessarily imply and would not ordinarily be understood to mean that the prosecutor was commenting on the fact that the defendant had not taken the witness stand.

This Court in the case of *Bilodeau v. United States*, 14 F.2d 582, 586 (1926) found the following comments by counsel were proper:

“ . . . May I ask counsel to show these checks to his client before I read them, and if there is any further action in the matter I have no objection to his having an opportunity to meet them.”

In the case of *Robilio v. United States*, 291 Fed. 975, 985 (6th Cir. 1923) the Court found the following comments of the District Attorney proper:

“Andy Wallace was the spokesman of this partnership, and yet no one goes on the stand and says that the conversation did not occur.”

And again:

“Tyree Taylor says that he had this conversation with Andy Wallace, and no man goes on the stand to deny it—”

and again:

“Mrs. Taylor says she had these conversations with Andy Wallace, and no one comes before this jury to deny them.”

In the instant case, the Government evidence was uncontradicted in all aspects. The comments of the District Attorney merely called attention to this fact.

Nowhere was there any reference made to the failure of the appellant to testify. There is no showing by the appellant that the only evidence available to rebut the Government's case would have to come from him. The only adverse comment was that made by the counsel for the defendant Ing, who apparently at this point in the trial was acting for and on behalf of the appellant. It has been held that the action of the defendant's counsel in misconstruing the comments of the prosecutor cannot be attributed to the Government. See *State v. O'Brien*, 77 So. 2d 402, 405 (La. 1954).

VI. THE TRIAL COURT'S RULING IN REFUSING TO PERMIT THE APPELLANT TO INSPECT HIS CONFESSION PRIOR TO TRIAL WAS PROPER.

Subsequent to Indictment and prior to the actual commencing of the appellant's trial, appellant made a motion pursuant to Rule 16 of the Federal Rules of Criminal Procedure, Title 18, U. S. C. After a hearing on the motion, and extensive argument, the trial Judge denied the appellant's motion to inspect a written statement signed by him, in which he admitted the crimes with which he was charged. Rule 16 of the Federal Rules of Criminal Procedure afford a defendant a limited right to pre-trial inspection for purposes of discovery. The Rule provides that the Court "may" rather than the Court "shall" direct inspection. It has been held that this language gives the trial Court discretion to deny inspection on grounds not exemplified in the Rule. See *United States v. Schneiderman*, 104 F.Supp. 405 (S.D. Cal. 1952).

The Rule has been interpreted as a departure from which had been allowed previously in criminal cases. See *Bowen Dairy Company v. United States*, 341 U.S. 214, 219 (1951). As stated by the appellant on page 34 of his brief, the numerical weight of decisions construing Rule 16, is that a defendant cannot require the Government to furnish him, prior to trial, with a copy of his statement or confession. Various reasons have been stated for denial of discovery under these circumstances. The United States District Court for the Northern District of Indiana, in the early case of *United States v. Black*, 6 FRD 270, 271 (1946), refused to allow the defendant to inspect statements made by him on the ground that Rule 16 applies only to those documents and objects which were in existence and in custody of the defendant prior to the Government's obtainment of them.

The United States Court of Appeals for the 8th Circuit and the 5th Circuit respectively, have held that Rule 16 cannot be interpreted to encompass a situation such as the one now before the Court. In *Shores v. United States*, 174 F.2d 838, 843 (8th Cir. 1949), the Court stated as follows:

"In a general sense, of course, a confession may be regarded as a paper or document 'obtained' from the defendant. But reading the language of the rule in the light of the history involved in its formulation and in its context, we do not believe that such was its intended legal connotation and purpose here. The Notes of the Advisory Committee undertook to point out that it was doubtful whether discovery was permissible in criminal

cases under existing law, and then added, as to the intended scope of the formulated rule, the following: 'The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him. * * * The rule is a restatement of this procedure. In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process, on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution. The entire matter is left within the discretion of the court'."

In the case of *Schaffer v. United States*, 221 F. 2d 17, 19, 20 (5th Cir. 1955), the Court stated:

"The appellant Schaffer insists that the court erred in denying his motion for the production of statements signed by him for the Naval authorities on or about June 24, 1952, and for the FBI agent on June 27, 1952, which statements were used in part in the dictation by the FBI agent, in Schaffer's presence, of the statement of July 10, 1952, signed by Schaffer, and which was introduced in evidence. A defendant's signed statement does not come within the purview of Rule 16 of the Federal Rules of Criminal Procedure as being a document in the custody of the defendant at the time the Government acquired possession of it. *Shores v. United States*, 8 Cir., 174 F.2d 838, 843, 844, 11 A.L.R. 2d 635. We think the breadth of the demand by defendant Schaffer marks it as a 'fishing expedition' designed to probe the strength of the Government's evidence in advance of trial and that the trial court properly

denied the motion of the defendant Schaffer for the production of such statements. See *United States v. Muraskin*, 2 Cir., 99 F.2d 815, 816; *United States v. Rosenfeld*, 2 Cir., 57 F.2d 74, 76, 77."

In the case of *United States v. Peltz*, 18 FRD 394 (SD NY 1955) Judge Herlands, in an exhaustive opinion, explored the history of Rule 16 and prior procedure, and comes to the conclusion that an oral statement of a defendant, reduced to writing by a Government stenographer, does not come within the provisions of Rule 16.

A host of other cases have interpreted Rule 16 as it relates to the case at bar and come to the same conclusion as the trial Judge did in the instant case. See *United States v. Patrisso et al.*, 20 FRD 576, 579 (SD NY 1957); *United States v. Malizia*, 154 F. Supp. 511 (SD NY 1957); *United States v. Kiamie*, 18 FRD 421 (SD NY 1955); *United States v. Chandler*, 7 FRD 365 (DC Mass. 1947); *United States v. Bennethum*, 21 FRD 227 (DC Del. 1957); and *United States v. Jannuzzio, et al.*, 22 FRD 223 (DC Del. 1958).

The trial Judge was correct in refusing, prior to trial, to allow the appellant to inspect a confession given by him to police officers and to Mr. Harkabus. This was proper, because this confession was not the property of the appellant and was not obtained from him within the meaning of Rule 16. In any event, this is a matter that lies within the sound discretion of the trial Judge. The trial Judge in this instance did not

abuse that discretion. Even if the trial Judge did abuse his discretion, it was harmless error. The record reflects that the statement in question was marked for identification and the appellant and his counsel had an opportunity to inspect and review the statement at the time of trial. At the time, the appellant could have requested a continuance to review the statement and this was not done. Also, it should be noted that the trial Judge refused to admit this statement into evidence and it was not used by the Government in obtaining the conviction in the instant case.

CONCLUSION.

For the reasons stated, there was no prejudicial error committed at the appellant's trial. Therefore, the verdict of the jury and judgment of the trial court should be affirmed.

Dated, Anchorage, Alaska,
December 30, 1958.

Respectfully submitted,

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No. 16,041

United States Court of Appeals
For the Ninth Circuit

CHARLES E. SMITH,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the
District of Alaska, Third Division.

APPELLANT'S REPLY BRIEF.

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FILED

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APPELLANT'S REPLY BRIEF.

In this reply brief appellant will comment on appellee's argument in the order of its subdivisions.

I.

Commencing on page 6 of its brief appellee reasons that it was not error to admit the testimony of Officer Dankworth concerning admissions made by appellant on March 27, 1957 because the trial Court erred in excluding the confession.

On pages 6, 7 and 8 appellee argues that the doctrine of *McNabb v. United States*, 318 U.S. 332, *U. S.*

v. Carignan, 342 U.S. 36, and *Mallory v. United States*, 354 U.S. 449, do not apply and commencing near the top of page 7 appellee states as follows:

“In the case at bar, the appellant was promptly informed of his rights and advised that he was entitled to the services of an attorney (R. 148, 150). The appellant was arrested pursuant to a warrant signed by the United States Commissioner (R. 294). The appellant apparently received legal advice before signing his statement (R. 159, 160, 204). The appellant was arraigned in Seattle during normal business hours and again advised of his rights and had assistance of counsel (R. 173, 299, 300, 301). The record is devoid of any coercion or prolonged questioning or third degree methods. The McNabb case could not be applied to the facts here under any logical stretch of one’s imagination.”

Analyzing the above in the order that the sentences occur and referring to the transcript citations, it is found that the testimony substantiating the fact that appellant was promptly informed of his rights and advised that he was entitled to the services of an attorney appears in the cross-examination of Special Agent Harkabus of the Board of Fire Underwriters by counsel for appellant. Harkabus stated that he was not interested in the crime for which appellant was arrested. Officers Pass and Trafton who were responsible for appellant’s arrest and who conducted the initial examination on the day of the arrest were not available for the trial. Territorial Police Officer Trafton was on vacation in Japan. Detective Pass had been fired by the Anchorage Police Department and

was confined to a hospital in South Carolina. We have only Special Agent Harkabus' testimony on this point to contradict that of appellant to the effect that he was not advised that he need not make a statement or that he was entitled to the services of an attorney. The Court's attention is invited to Harkabus' statement on page 148 of the transcript (made out of response to a question posed by appellant's counsel in order to get it in the record) that Detective Pass had actually informed appellant that he need not make a statement and that he was entitled to the services of counsel. It is obvious from Harkabus' answer that he was attempting to supply vital information which the arresting and interrogating officers were not going to supply.

Appellee, based on the transcript citations mentioned, *assumes* that "appellant was promptly informed of his rights and advised that he was entitled to the services of an attorney". The thing that was not "promptly" done immediately after appellant's arrest was to take him before an officer for arraignment as required. The record shows that appellant was arrested around 3:00 o'clock P.M. and immediately taken to the King County Jail in Seattle, where his interrogation commenced immediately.

Appellee contends that appellant was arrested pursuant to a warrant. A warrant apparently did issue in Anchorage on March 14th. There is no direct evidence and it seems unlikely that the warrant was received in Seattle in time to arrest appellant in Renton, Washington at 3:00 o'clock P.M. the following day.

Neither Pass nor Trafton were present to testify that they had such a warrant. The Court's attention is invited to the evasive testimony of Special Agent Harkabus to the effect that he thought he saw a warrant. (Tr. 139-140, 146.) Appellee *assumes* that appellant "apparently received legal advice before signing his statement" and gives transcript citations to support such a conclusion. A study of the transcript's citations given will show conclusively that appellant's attorney was barred from the interrogation room during the time appellant was being grilled for the third successive day in connection with the charge. A study of appellee's transcript citations and the pages immediately preceding and following the citations will show conclusively that appellant was prevented from consulting with his attorney in a manner disgraceful to law enforcement procedure.

Appellee again assumes that appellant was arraigned in Seattle during *normal business hours*. There is nothing in the record to show that Friday afternoon of March 15, 1957 was not a normal business day. After appellant's arrest he could have been immediately taken before an arraigning officer. This was not done. Appellant was interrogated instead. He could have been taken before an arraigning officer on Saturday, nor was this done. Again he was interrogated. He was not taken before an arraigning officer until the following Monday and even the Monday appearance may not actually have been an arraignment as far as the writer can determine. Appellant's testimony was that the appearance was an argument

over extradition. If such appearance was an arraignment why did the government again arraign appellant when he was returned to Anchorage, Alaska? It is not customary to twice arraign a person charged with a crime. In fact it would appear to the writer to be extremely unusual and only done for a reason. The reason for the second arraignment has never been explained. Appellee would have the Court believe that appellant could not have been arraigned before the following Monday because it would not have been during normal business hours in Seattle.

On page 10 of its brief appellee states that even if the case of *Nardone v. United States*, 308 U.S. 338, is extended beyond its factual context that nevertheless the influence of the first confession obtained from appellant was so diminished after legal advice and two arraignments as to have no causal connection whatever with the admissions objected to.

The conclusion of appellee is not supported by the facts. It is undisputed that from the moment of appellant's arrest Friday afternoon, March 15, 1957, until the time he was finally released on reduced bail in Anchorage, Alaska, on April 4, 1957, he was constantly either in jail, being questioned by officers, in the custody of Special Agent Harkabus traveling to Alaska, in jail in Anchorage or out of jail in Anchorage and in the custody of Special Agent Harkabus, Officers Pass and Trafton traveling around the Anchorage area being questioned on the confession during which time reiterations were obtained. The influence of Officer Harkabus was never relaxed prior

to appellant's being released on bail and securing counsel for the first time.

Appellee quotes Judge Holtzoff in *U. S. v. Heide-man*, 21 FRD 335, 336, on page 13 of its brief. Judge Holtzoff analyzes the holding in the *Mallory* case strictly on the facts (page 338) as being a holding that 7½ hours is too long an interval and constitutes an unreasonable delay in bringing a prisoner before a committing magistrate. Judge Holtzoff goes on to hold in his case that 1¼ hours after arrest is not an unreasonable delay in bringing the accused before a committing magistrate. It would appear from such reasoning that Judge Holtzoff himself would have had no difficulty at all in holding in the case before this Court that a delay of approximately 65 hours in bringing the accused before a committing magistrate was certainly excessive. This is assuming that the Monday morning hearing actually constituted an arraignment.

II.

On page 15 of its brief appellee requests that appellant state some authority for the contention that the trial Court should have allowed a private hearing to determine whether later admissions reiterating the contents of the excluded confession, made by appellant in the presence of Officer Dankworth, should be admitted as voluntarily made.

Appellant cites the case of *McNabb v. United States*, 318 U.S. 332, 346, where the Court says that if, in the course of a criminal trial in the Federal

Courts, it appears that evidence has been obtained in violation of legal rights, it is the duty of the trial Court to entertain a motion for the exclusion of such evidence and to hold a hearing to determine whether the motion should be granted or denied. The Court goes on to point out that the interruption of the trial for this purpose should be no longer than is required for a competent determination of the substantiality of the question.

When counsel for appellant objected to the introduction of the written confession and requested a private hearing to determine the question of its voluntariness the Court very properly held such a private hearing and decided that the confession was not admissible.

The undisputed facts in this case are that, after the confession had been obtained and after the appellant had been removed to Alaska and while still in the almost constant custody of Special Agent Harkabus and Officers Pass and Trafton during any period he was away from the federal jail in Anchorage, he is supposed to have voluntarily made certain admissions which reiterated the contents of the excluded confession. It is undisputed that at the time the admissions were supposed to have been made appellant was in the custody of Special Agent Harkabus, Detective Pass and Officers Trafton and Laird as well as Officer Dankworth and in an office of the Territorial Police in Anchorage, Alaska. The Government's witness stated that the admissions made by appellant were voluntary. The question that counsel for appellant

wanted decided before the case proceeded any further was whether the admissions actually were voluntary. In order to determine this question the jury should have been excluded from the courtroom and counsel for appellant should have been permitted to examine Officer Dankworth as to the complete circumstances surrounding the so-called admissions just as was done in the same trial in the case of Special Agent Harkabus and the excluded confession. While the jury was still excluded counsel for appellant could have placed appellant Smith on the witness stand to testify further in connection with the voluntary nature of the so-called admissions. Such a hearing was not permitted. In fact, was specifically denied. After denial of the motion all opportunity for counsel for appellant to show to the Court as a matter of law that the admissions were not voluntarily made was lost.

It is submitted that the principle outlined in *McNabb v. United States* and the principle actually followed in this case during its trial with respect to Special Agent Harkabus' testimony and the voluntary nature of the confession, control should have been followed.

Appellee states at the bottom of page 15 of its brief that:

"The trial Judge allowed a hearing on the appellant's motion to strike Mr. Dankworth's testimony".

What appellee means is that the judge allowed argument on appellant's written motion to strike. No

hearing was ever conducted to determine the voluntary nature of appellant's alleged admissions.

III.

On page 16 of its brief appellee cites the case of *Morton v. United States*, 147 F. (2d) 28, 31, in support of its contention that the trial Court did not err in refusing to instruct that the admissions of appellant must have been voluntarily made.

In the *Morton* case appellant was questioned by officers and made certain admissions which were later repeated by an officer on the witness stand. It appears also from this decision that a confession given under the same circumstances as the admissions would have been admissible. It is also undisputed that appellant was immediately taken before a committing magistrate.

If, as appellee contends, the voluntariness of the admissions is a question of law for the Court, then appellant's argument that a hearing should have been conducted by the Court before Dankworth was permitted to testify, is reinforced.

Exception was taken by appellant to the Court's failure to instruct the jury on this question. (2nd Supp. Tr. 334.)

IV.

Covered in preceding argument.

V.

Appellant has no comment concerning appellee's argument on this point commencing on page 17 of its brief.

The original remarks of the U. S. Attorney in closing argument were borderline even in their most favorable light. With each following exchange the U. S. Attorney and the judge aggravated the situation into reversible error.

VI.

On page 23 of its brief appellee cites the case of *Shores v. United States*, 174 F. (2d) 838, 843 (8th Cir. 1949), in support of its contention that the trial Court did not err in refusing to permit appellant to inspect his confession prior to trial.

This identical case was cited by appellant in his brief as an example of how a Court could reason around the plain language of a rule using the Notes of the Advisory Committee. On page 843 the Court stated:

“In a general sense, of course, a confession may be regarded as a paper or document ‘obtained’ from the defendant. But reading the language of the rule in the light of the history involved in its formulation and in its context, we do not believe such was its intended legal connotation and the purpose here. The notes of the Advisory Committee undertook to point out that it was doubtful whether discovery was permissible in criminal

cases under existing law, and then added, as to the intended scope of the formulated rule, the following: 'The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him. . . .'

Rule 16 of the Federal Rules of Criminal Procedure is not ambiguous. It plainly states that upon motion of a defendant the Court "may order" to permit inspection, copying or photographing designated books, papers, documents or tangible objects obtained from or belonging to the defendant "upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable."

True, it does not say the Court "*shall order*." Neither does it say the defense "*shall*" prove that the item is material to preparation of the defense. The request must be "reasonable"—a matter for the trial Court's discretion.

It is submitted that the "intent" of the Advisory Committee at the time the rule was submitted in unambiguous draft form is no longer important. Once the Supreme Court has adopted and promulgated the rule the intent of the Supreme Court should be the criterion in applying the rule to the facts of a given case. Certainly, the intent of the Advisory Committee should not be used to create ambiguity where none exists.

In the *Shores* decision the Court admits that in a general sense, a confession may be regarded as a

paper or document obtained from the defendant. The Court then goes on to decide that the rule can not possibly mean what it says but was meant by the Advisory Committee to be merely a restatement of existing practice in some Courts of permitting limited discovery.

It would seem that the intent of the rule is to grant a defendant discovery as to the items mentioned unless the request appears unreasonable or the items are not necessary to the preparation of the defense. If the request for discovery is denied it should be based on at least one of the two grounds specifically mentioned as a limitation on the right. In this case neither ground was urged as a reason for denial, nor did the Court make any finding that either objection or limitation existed.

See Barron, Federal Practice and Procedure, Vol. 4, Sec. 2031, pages 124-125.

Dated, Anchorage, Alaska,
January 28, 1959.

Respectfully submitted,

BUELL A. NESBETT,

Attorney for Appellant.

No. 16043 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERNARD STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 16043

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BERNARD STEIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

This is an appeal from a judgment of conviction by the United States District Court for the Southern District of California which adjudged the appellant guilty on each of two counts of an indictment returned by the Grand Jury for the Southern District of California, which indictment was brought under the provisions of Section 174 of Title 21, United States Code.

The violations are alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California.

The jurisdiction of the United States District Court is based upon Section 3231, Title 18, United States Code. This court has jurisdiction to entertain this appeal and to review the proceedings leading to said judgment by reason of the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II.

Argument.

In connection with the appellant's contention that the evidence was not sufficient to establish a conviction under Count One of the indictment, this Court's attention is called to the fact that no motion for a judgment of acquittal was made by appellant before the trial court. It is clear that such a motion must be made at the end of the government's case and renewed at the end of the defense before alleged insufficiency of evidence can be urged before the Court of Appeals, except to prevent a manifest miscarriage of justice.

Fallen v. United States (1950), 220 F. 2d 946;

Kreinberg v. United States (1954), 216 F. 2d 671.

At any event, there is no merit in appellant's contention with respect to this point.

In connection with appellant's possession of the package of heroin involved in this case, the strongest inferences of constructive possession are shown by the record. That is sufficient to invoke the presumption of unlawful importation and knowledge thereof as set forth in the statute.

21 U. S. C., Sec. 174.

In *Brown v. United States*, 222 F. 2d 293 at 297, this Court said:

"In *Mullaney v. United States*, 9 Cir., 1936, 82 F. 2d 638, 642, this Court approved an instruction of the trial court that 'possession of a thing means having in one's control or under one's domination.' It is not necessary that possession be immediate or exclusive. *Mullaney v. United States*, supra; *Borgfeldt v. United States*, 9 Cir., 1933, 67 F. 2d 967."

All of the evidence shows that appellant Stein had at least a constructive possession of the package of narcotics. It was definitely under his control and under his dominion prior to the time it was picked up by the agent. Of course, an Appellate Court will not resolve conflicts in the evidence nor pass upon the credibility of witnesses who appeared at trial, and this court will consider the evidence and all the fair and reasonable inferences that flow therefrom from the aspect most favorable to supporting the verdict of Judge William Byrne, as the trier of facts, and the judgment of conviction.

Woodward Laboratories, Inc., et al. v. United States (9th Cir., 1952), 198 F. 2d 995, 998;

Pasadena Research Laboratory v. United States (9th Cir., 1948), 169 F. 2d 375, 380, cert. den. 335 U. S. 853.

The evidence showed here that the preliminary arrangements were made for the sale of a quantity of heroin from Stein to Browning and that Browning later contacted Stein personally for the delivery and payment. Later, Browning went to Stein's apartment and it is uncontroverted that Stein walked out on the street with him. Then, according to the testimony of both Browning and the agent, Stein pointed to a package in the street which was proved to contain heroin at that time. In the interim before Browning came to his apartment and the two walked outside, Stein had plenty of time to either make the drop of narcotics himself near the curb at the street corner or to arrange for the package to be placed there by his connection. In either event, at the time he pointed to the package, Stein had it in his control and under his dominion within the definition of constructive possession.

The entire transaction ran true to form to the well-known facts surrounding the devious fashion used by those who negotiate for the illicit sale of heroin. The persons who engage in this traffic do not wish to be caught with the narcotics in their hand and devise many different schemes for the delivery of heroin by placing it at curbs or behind bushes or underneath trees or underneath the wheels of automobiles. It is submitted that no one could seriously contend that actual possession in the hand of the defendant would be necessary before a conviction, using the rule of evidence contained in the presumption, before a conviction could be obtained. If that were true, a "drop" underneath or beside or behind a convenient landmark, such as the curb in this case, would be sufficient to put the government on proof of importation and knowledge thereof. Certainly Congress did not intend that an obvious device, one used commonly in the illegal traffic of narcotics, should be without the purview of the presumption.

It is equally obvious that the trial court in this case believed the testimony of Browning and the agent as to the facts surrounding the negotiation of the sale of heroin, including the fact that Stein did point out the package containing the heroin to Browning. There is ample evidence to support the verdict of the court that Stein as a matter of fact had possession of the drugs within the purview of the presumption and therefore the conviction on Count One of receiving and concealing the heroin should be affirmed.

In passing, it appears the trial court was not concerned with the contention made about an absence of the appellant's fingerprints from the package. Anyway, such a point was only for the consideration of the trial court.

We might note that the transcript shows that *no* fingerprints were taken from the package [Rep. Tr. 133, 134]; not that there were other fingerprints on the paper but no fingerprints belonging to Stein. Even if the latter situation had existed, it was for the trial court to decide whether or not the defendant still had constructive possession of the package under the *Brown* case.

In conclusion on this point, the government submits to this court that the matters raised by appellant on the merits of his point in connection with possession were matters to be resolved by the trial court and that there is substantial evidence to support the judgment of conviction.

In connection with appellant's contention that a statement allegedly made by defendant to a narcotics officer was not free and voluntary, the government urges that this point is frivolous.

We might point out, in the inception, that the defendant had had several meetings with certain agents after the time of the transaction set forth in the indictment. The purpose of the meetings was obviously to secure cooperation from Stein because the officers believed that he had important connections in the illegal traffic of heroin. Even though there is some indication that a discussion was had with Stein as to the possibility of his not being prosecuted if he were cooperative, nothing ever came of it. At any event, there is no evidence that the purpose of the conferences were to get a confession or admission from the defendant. Further, the very words of the statement by appellant show it to be a spontaneous exclamation, a voluntary outburst on his part, not caused by any alleged arrangement.

Even so, there could have been no prejudice resulting to the defendant through this statement being admitted in evidence. Upon hindsight, it could actually be said that the statement was favorable to appellant. It could be interpreted as indicating that he had merely helped Browning in connection with his racing bets and, because of that, he had gotten into all this trouble. Perhaps it could be said that he was referring to his so-called friendship with Browning over a period of time. At any event, particularly with a court-tried case as was the instant matter, and with the strong evidence of appellant's guilt in connection with the concealment and sale of heroin, there was nothing in the alleged remark which could have prejudiced him in the Court's eyes in any way.

With respect to the contention that the case involved an unlawful entrapment, it is first submitted that the evidence did not show any such factual situation. The agent merely made the opportunity available to Stein to sell the heroin to Browning. The evidence does not show that the appellant was prevailed upon against his better judgment to make an isolated sale of narcotics. Secondly, the defense was not raised at trial. As counsel for appellant stated, in his brief, Stein had a prior conviction on a narcotics offense which was brought out only when the defendant took the stand. Obviously it was only used for the purpose of impeachment because the defense of entrapment was not brought to the court's attention at the time of trial. The government, therefore, had no opportunity to bring out all the knowledge the agent had as to the defendant's prior activities or criminal record. Such information would be available for the limited purpose of rebutting this defense. Appellant has attempted to secure unfair advantage against the government before

this court by endeavoring to have the matter raised at this time. The record indicates it is entirely possible that Agent Solomon knew of Stein's previous conviction [Rep. Tr. 101] and he may have known of other previous activities in the illegal traffic of narcotics, but the government should have had an opportunity to make a clear record before the trier of facts.

It should be noted that, as counsel for the appellant states, Stein *denied* in the trial court that the offense had been committed by him. In order to raise the defense of entrapment at the trial Stein would have had to admit the offense and then attempt to explain it away by trying to convince the Court or jury that an unlawful entrapment had been accomplished. However, the appellant now attempts to have the benefit of denying the crime before the trial court and then of raising the defense of entrapment before this court.

At any event, as stated above, the defense certainly would have had little persuasion upon the trial court at the time of trial. Appellant was merely offered an opportunity to make the sale which comprised a *lawful* "entrapment." The credibility of the witnesses was for Judge Byrne to resolve and his finding of a verdict of guilty on both counts should not be disturbed by this court where the evidence to support the conviction was sufficient.

Appellant's last point, that a continuance of the trial should have been granted by Judge Byrne, also borders on the frivolous. The record of this part of the proceedings is not before this court as yet, but appellee has been advised appellant is arranging to have it brought up. On cross-examination of the doctor, who was called by appellant to the stand in connection with his motion

for continuance, the government brought out that there was nothing much wrong with the appellant, except that he had had some trouble with his back and also had the normal nervous apprehension of any defendant who is brought to trial before the United States District Court. There was no showing that he was on the verge of a collapse and was unable physically to proceed to trial. In fact, the opposite was apparent after the doctor admitted that there was very little wrong with him. Counsel for appellant states that throughout the trial the defendant acted in a manner such as indicated he was ill. Such evidence is not before this court. If such an observation in that respect could be made at this time, government counsel would dispute counsel's assertion. In fact, as counsel for appellant has also stated, the defendant appeared throughout the trial on each occasion and, after the doctor was called, never again made any contention that he could not proceed nor did any problem arise which was brought to the attention of the court with respect to his health.

At any event, it is obvious that the denial of the motion for a continuance was not an abuse of discretion by Judge Byrne. There is not even any claim that a prejudice resulted to the defendant from the denial of the motion. There is no suggestion that any further evidence would have been developed or that somehow during the trial the proceedings were hindered by any state of facts whatsoever. The defendant took the stand to testify and there is no claim that he would have done any differently if the case had been delayed for any reason. Counsel for appellant states that "injustice can sometimes be done," but does not contend that injustice *was* done in this case.

III.

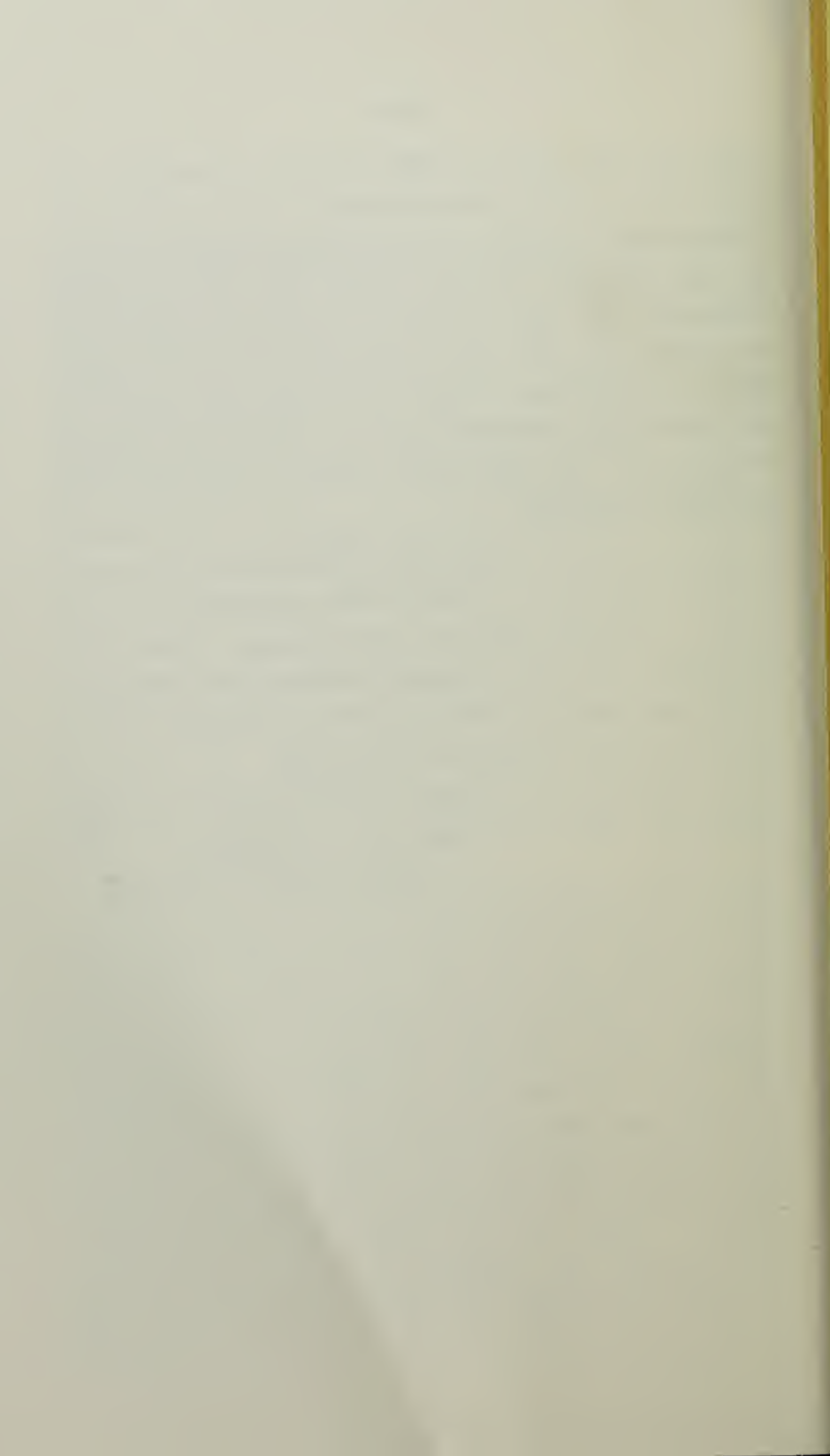
Conclusion.

That there is sufficient and substantial evidence to support the conviction on both Counts One and Two of the indictment; that the contentions raised by appellant are, or border upon, the frivolous; that there was no prejudice to the defense at any time during the trial or in the proceedings connected with the trial; and that the judgment of conviction below should be affirmed is respectfully submitted.

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No. 16046.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON GRADY RAMSEY, Claimant of ONE 1955 FORD
SEDAN, Motor No. U5RW123141, its tools and appur-
tenances,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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II.

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No. 16046.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILTON GRADY RAMSEY, Claimant of ONE 1955 FORD
SEDAN, Motor No. U5RW123141, its tools and appur-
tenances,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

The United States District Court had jurisdiction to render its judgment in the action entitled *United States of America v. One 1955 Ford Sedan, Motor No. U5RW123141, its tools and appurtenances*, Civil No. 19773-T, pursuant to the authority contained in Title 28, United States Code, Section 1355. There is no dispute that the libeled automobile is and was at all times within the Central Division of the Southern District of California.

This court has jurisdiction of this appeal from the Findings of Fact, Conclusions of Law and Final Judgment of the District Court in favor of the appellee and against the appellant ordering the said 1955 Ford Sedan,

Motor No. U5RW123141, its tools and appurtenances, condemned and forfeited to the United States of America. Under the provisions of Title 28, United States Code, Sections 1291 and 1294(1) said judgment and order was a final decision of the District Court.

Statutes Involved.

Title 26, United States Code:

“Section 5008(b) Stamps for containers of other distilled Spirits.—

(1) Requirements.—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto in such manner as to be broken on opening the container, a stamp evidencing the tax or indicating compliance with the provisions of this chapter. The provisions of this subsection shall not apply to—

(A) distilled spirits placed in containers for immediate consumption on the premises or for preparation for such consumption;

(B) distilled spirits in bond or in customs custody;

(C) distilled spirits in immediate container required to be stamped under subsection (a) or under other provisions of internal revenue or customs law and regulations;

(D) distilled spirits in actual process of rectification, blending, or bottling, or in actual use in processes of manufacture;

(E) distilled spirits on which no internal revenue tax is required to be paid or which are bottled especially for export with benefit of drawback;

(F) distilled spirits not intended for sale; or for use in the manufacture or production of any article intended for sale; or

(G) any regularly established common carrier receiving, transporting, delivering, or holding for transportation or delivery distilled spirits in the ordinary course of its business as a common carrier.

“Title 26, United States Code, Section 7302. *Property used in violation of internal revenue laws.*

It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws. Aug. 16, 1954; 9:45 a.m., E.D.T., c. 736, 68A Stat. 867.”

Statement of the Case.

This is an appeal from the decision of the District Court condemning and forfeiting One 1955 Ford Sedan, Motor No. U5RW123141, its tools and appurtenances, to the United States of America for its use to transport, possess, buy, sell and transfer certain distilled spirits, the

immediate containers of which did not have affixed thereto stamps denoting the quantity of those spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits, in violation of Title 26, United States Code, Section 5008(b)(1).

Appellant is the claimant and registered owner of the subject Ford automobile. The evidence, and all reasonable inferences drawn therefrom by the trier of fact, shows that the vehicle was used to transport, possess, buy, sell and transfer certain distilled spirits as stated above, so as to subject the car to forfeiture. Appellant, at the time of the seizure, had never paid any of the taxes due on the said distilled spirits nor did he obtain the necessary strip stamps as required by Section 5008, Title 26, United States Code.

On or about September 15, 1955, duly authorized and acting investigators of the Alcohol and Tobacco Tax Division, Internal Revenue Service, Treasury Department of the United States, seized the said 1955 Ford Sedan automobile in the County of Los Angeles, State of California. Thereafter, the Government filed its Libel of Information wherein it alleged the illegal use of the vehicle in connection with the appellant's distillation activities which subjected the car to condemnation and forfeiture.

The appellant filed an Answer to the Government's Libel of Information. At the conclusion of the trial the District Court gave judgment in favor of the Government and ordered the condemnation and forfeiture, to the United States, of the 1955 Ford Sedan.

Summary of Argument.

I.

THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS THAT THE 1955 FORD SEDAN, MOTOR NO. U5RW123141, ITS TOOLS AND APPURTENANCES, HAVE BEEN USED TO TRANSPORT, POSSESS, BUY, SELL AND TRANSFER CERTAIN DISTILLED SPIRITS, THE IMMEDIATE CONTAINERS OF WHICH DID NOT HAVE AFFIXED THERETO STAMPS DENOTING THE QUANTITY OF DISTILLED SPIRITS CONTAINED THEREIN AND EVIDENCING PAYMENT OF ALL INTERNAL REVENUE TAXES IMPOSED ON SUCH SPIRITS, IN VIOLATION OF TITLE 26, UNITED STATES CODE, SECTION 5008(b)(1).

II.

THE JUDGMENT IS NOT CONTRARY TO LAW BECAUSE THE USE OF THE SEIZED AUTOMOBILE TO TRANSPORT, POSSESS, BUY, SELL AND TRANSFER CERTAIN DISTILLED SPIRITS, THE IMMEDIATE CONTAINERS OF WHICH DID NOT HAVE AFFIXED THERETO STAMPS DENOTING THE QUANTITY OF DISTILLED SPIRITS CONTAINED THEREIN AND EVIDENCING PAYMENT OF ALL INTERNAL REVENUE TAXES IMPOSED ON SUCH SPIRITS, IN VIOLATION OF UNITED STATES CODE, SECTION 5008(b)(1), COMES WITHIN THE MEANING OF SECTION 7302 OF THE INTERNAL REVENUE CODE, WHICH SUBJECTS AN AUTOMOBILE TO FORFEITURE WHEN IT IS, . . . "INTENDED FOR USE IN VIOLATING . . . THE INTERNAL REVENUE LAWS . . . OR WHICH HAS BEEN SO USED. . . ."

III.

THE SEIZURE OF THE SUBJECT FORD SEDAN AUTOMOBILE WAS LEGAL AND FURTHER THE LAW OF SEARCH AND SEIZURE DOES NOT APPLY TO THE RES IN AN IN REM LIBEL PROCEEDING.

ARGUMENT.

I.

The Evidence Supports the Trial Court's Findings That the 1955 Ford Sedan, Motor No. U5RW-123141, Its Tools and Appurtenances, Have Been Used to Transport, Possess, Buy, Sell and Transfer Certain Distilled Spirits, the Immediate Containers of Which Did Not Have Affixed Thereto Stamps Denoting the Quantity of Distilled Spirits Contained Therein and Evidencing Payment of All Internal Revenue Taxes Imposed on Such Spirits, in Violation of Title 26, United States Code, Section 5008(b)(1).

I.

At the trial of this case, the court received in evidence the record of conviction of the claimant, Milton Grady Ramsey, in case number 24515-CD in the United States District Court, in and for the Southern District of California, Central Division. The record of conviction consisted of the indictment, the verdict, and the judgment on the verdict. The receipt of such evidence by the court was proper.

United States v. Wainer, 211 F. 2d 669 (C. A. 7, 1954);

Local 167 of the International Brotherhood of Teamsters, Chauffers, Stablemen and Helpers v. United States, 291 U. S. 293;

Austin v. United States, 125 F. 2d 816 (C. A. 7);
Stagecrafter's Club, Inc. v. District of Columbia Division, 111 Fed. 127 (D. C.);

United States v. Bower, 95 Fed. Supp. 19 (D. C.);
5 Wigmore, Evidence (3d Ed., 1940), Sec. 1671a.

The above authority stands for the proposition of law that the record of a party's conviction in a previous criminal proceeding may properly be admitted in evidence in a civil action arising out of the same factual situation.

Counts II, III and IV of the indictment against the claimant, Milton Grady Ramsey, of which he was found guilty, shows that he, Milton Grady Ramsey, did carry on and engage in the business of a distiller and rectifier of distilled spirits with intent to defraud the United States of the tax on the spirits distilled by him. And further that the appellant refused to give notice thereof which is required by the Internal Revenue Code and that he willfully failed to pay the special tax as required by the Internal Revenue Code. In Count V of the indictment, it is shown that he, Milton Grady Ramsey, did possess distilled spirits, namely, approximately forty gallons of distilled spirits, the immediate containers of which did not have affixed to them a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits, in violation of United States Code, Title 26, Section 5008 (b)(1).

The deposition of the claimant, Milton Grady Ramsey, taken on June 6, 1957, was next offered and received in evidence. Such offer and receipt in evidence by the court was proper under Rules 26(f) and 43(b) of the Federal Rules of Civil Procedure. Mr. Ramsey, in his deposition, admitted the distillation of spirits and that he had not paid any of the taxes or obtained any of the necessary stamps and permits at the time of the seizure of the subject Ford vehicle. He further admitted making many gallons of distilled spirits; that he had a still of one hundred-gallon capacity, and that he had twelve or so

fifty-gallon fermenting barrels. He also had on the premises many gallon jugs which he claimed were brought there from a restaurant that he owned a year previous, and which were empty soda syrup containers. He further stated that he used the one-gallon jugs to give away the spirits he distilled to people and seldom gave away more than one, two or three gallons at a time. He also admitted that aside from the one-hundred-gallon capacity still with a coil condenser and rectifier and the twelve or so fifty-gallon fermenting barrels that he also had approximately five-hundred and fifty pounds of corn starch sugar, approximately five gallons of dextrose malt, a mash pump and motor, and miscellaneous hoses, hydrometers and thermometers which were used in connection with the distillation of spirits and which were on his premises as of the date of seizure, September 15, 1955.

Mr. Ramsey further stated in his deposition that since he closed his restaurant in 1954, approximately a year before the seizure, that he had no source of income.

From this evidence the court made certain findings and drew certain inferences which appear in the Reporter's Transcript of Proceedings, dated Wednesday, December 18, 1957, pages 1 through 13. The court remarked that the distillation, although contended to be only a sideline, and even though Ramsey was denied the benefit of the income he formerly enjoyed from his business, he would have the court believe that he engaged in what might be termed a large scale distilling operation merely for the purpose of experimenting without seeking remuneration or profit. The court found this to be unbelievable and further found that it strained the court's imagination to accept the explanation that the forty jugs filled with distilled spirits and distributed in small lots, were delivered

to different people who, in all cases, called for and picked up the intoxicating spirits on the claimant's premises. The court inferred and found in view of the close proximity of the respondent Ford automobile and the bottled spirits that out of the admitted forty gallons disposed of, some must have been delivered by car. Further, the court inferred that the delivery of distilled spirits by automobile was an integral part of the operation of Ramsey. The court concluded that in view of all the inconsistencies contained in the story of the claimant, Ramsey, and the claimant's unpersuasive explanation of his motives and actions, that it would and did draw inferences that the claimant was an interested witness and was attempting to camouflage his activities for the purpose of avoiding forfeiture and that he did in fact use the subject 1955 Ford automobile to deliver the untaxpaid spirits.

The appellee contends that the inferences drawn from the evidence were reasonable and proper and that the evidence and inferences clearly support the findings of the court that the subject 1955 Ford sedan automobile had been used to transport, possess, buy, sell and transfer certain distilled spirits, the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits, in violation of Title 26, United States Code, Section 5008(b)(1).

It is a well-recognized principle that a trial judge's findings of fact are never to be lightly disturbed by a reviewing court. Generally, appellate courts will not overturn findings of fact of the trial judge, since he has had the opportunity to hear and see the witnesses. The trial judge's findings must be given great weight and should

be binding, unless clearly based on an obvious error of law, or a serious mistake or misconception of a fact.

National Surety Company v. Globe Grain and Milling Company, 256 Fed. 601 (C. A. 9);

Woodbury, et al. v. City of Shawnee Town, 74 Fed. 205 (C. A. 7);

Fidelity and Casualty Company of New York v. Phelps, et ux., 64 F. 2d 233 (C. A. 4).

II.

The Judgment Is Not Contrary to Law Because the Use of the Seized Automobile to Transport, Possess, Buy, Sell and Transfer Certain Distilled Spirits, the Immediate Containers of Which Did Not Have Affixed Thereto Stamps Denoting the Quantity of Distilled Spirits Contained Therein and Evidencing Payment of All Internal Revenue Taxes Imposed on Such Spirits, in Violation of United States Code, Section 5008(b)(1), Comes Within the Meaning of Section 7302 of the Internal Revenue Code, Which Subjects an Automobile to Forfeiture When It Is, . . . "Intended for Use in Violating . . . the Internal Revenue Laws . . . or Which Has Been so Used . . ."

The types of uses to which the appellant, Mr. Ramsey, put the subject vehicle have been held by courts to be sufficient to justify seizure and forfeiture of the vehicle pursuant to Section 7302 of Title 26, United States Code. In this case, the court found that the subject Ford automobile was used to transport, possess, buy, sell and transfer certain distilled spirits, the immediate containers of which did not have affixed thereto stamps denoting the quantity of said distilled spirits contained therein in evidencing payment of all internal revenue taxes imposed on such spirits, in violation of Title 26, United States Code,

Section 5008(b)(1). The cases are legend in permitting forfeitures of vehicles which have been used as described above.

United States v. Windle, 158 F. 2d 196;

Anderson v. United States, 195 F. 2d 343;

United States v. 1953 Model Glider Trailer, 120 Fed. Supp. 504;

United States v. 1952 Lincoln Sedan, 213 F. 2d 768;

Shiveley v. United States, 210 F. 2d 131;

Harman v. United States, 199 F. 2d 34;

United States v. One Chevrolet 4-Door Sedan, 1954 Model, 244 F. 2d 342;

United States v. 1955 Mercury Sedan, 242 F. 2d 429.

The last cited *Mercury Sedan* case is important because it holds that circumstantial evidence, including a showing that within twenty-two feet of the place where the subject automobile had stopped, four or five gallon jugs of moonshine whiskey were found, warranted the forfeiture of that automobile on the ground that it was used in the transportation of untaxpaid liquor.

It should be noted that the cases also hold that Section 7302 is a broad section and one that should not be strictly construed.

United States v. General Motors Acceptance Corporation, 239 F. 2d 102 (C. A. 5).

Since Section 7302 of the Internal Revenue Code is, in its plain reading, a very broad statute, such use of a vehicle as was shown and found in this case falls clearly within its meaning and subjects the vehicle to forfeiture.

The clear intention of Congress in the passage of such a broad section appears to be to double and increase the penalties involved in violations of the Internal Revenue Act so as to discourage persons who engage in such violations. It is not the duty of courts to change this procedure by way of judicial legislation but is a policy matter solely within the discretion of Congress.

III.

The Seizure of the Subject Ford Sedan Automobile Was Legal and Further the Law of Search and Seizure Does Not Apply to the Res in an In Rem Libel Proceeding.

Appellant contends that the court erred in overruling the objections to the introduction to the evidence on the grounds that the car was not legally seized in violation of the Fourth Amendment to the Constitution of the United States. However, appellant does not set forth what evidence he claims was improperly introduced as is required by Local Rule 18(d). Therefore, on the basis of appellant's argument the appellee can only assume that the appellant objects to the introduction of all evidence.

As to the claim of illegal search and seizure of the vehicle, it should be noted that this court decided this very same issue in the case of *Ramsey v. United States*, 245 F. 2d 295, wherein it was determined that there was no illegal search and seizure.

Further, it is the appellee's contention that the law of search and seizure, although properly complied with in this case, does not apply to a libel action where the proceeding is *in rem*. The privilege of the Fourth Amendment to the United States Constitution is personal and can only be claimed by the person whose rights have been

invaded. Since a libel action is *in rem* no personal rights can be involved. It is the appellee's contention that only probable cause need be shown for the seizure and if such probable cause is shown then the seizure is proper. It is only at the time of trial of the general issue that the Government need prove the elements essential for the decree of forfeiture.

The law as it relates to the problems of illegal search and seizure and the protections of the Fourth Amendment is held by the vast weight of majority opinion not to be applicable in a libel case. Rather, the vast weight of authority is that an illegal search and seizure will not vitiate the seizure in a libel.

United States v. 8 Boxes, etc., 105 F. 2d 896 (C. A. 2);

United States v. Pacific Finance Corporation, 110 F. 2d 732 (C. A. 2);

Strong v. United States, 46 F. 2d 257 (C. A. 1), appeal dis. per stip., 284 U. S. 691;

Bourke v. United States, 44 F. 2d 371, cert. den., 282 U. S. 897 (C. A. 6).

On the point that all the federal agent needs is probable cause for the seizure, the Government cites *United States v. One 1949 Pontiac Sedan*, 194 F. 2d 756, and particularly refers to the statements of the court on page 759 where it is stated:

"Thus we are faced initially with the question: What is meant by probable cause as that term is used in Section 1615? The Supreme Court was confronted with an identical problem of definition as early as 1813 in the case of *Locke v. United States*, 7 Cranch. 339, 11 U. S. 339, 3 L. Ed. 364. There an action was brought under a statute strikingly

similar to the one here involved, providing that in a libel proceeding for forfeiture of goods improperly imported into the United States, 'if the property be claimed by any person * * * the onus probandi shall lie upon such claimant. * * * but * * * only where probable cause is shown for such prosecution * * *.' 1 Stat. 678. Chief Justice Marshall, writing for a unanimous court, stated: 'It is contended that probable cause means *prima facie* evidence, or, in other words, such evidence as in the absence of exculpatory proof would justify condemnation. * * * This would render the provision totally inoperative. * * * The term * * * according to its usual acceptance, means less than evidence which would justify condemnation; * * * It imports a seizure made under circumstances which warrant suspicion.' See also *Wood v. United States*, 16 Pet. 342, 41 U. S. 342, 10 L. Ed. 987 ('reasonable ground of presumption that the charge is or may be, well founded'); *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 53 S. Ct. 620, 77 L. Ed. 1265 ('reasonable suspicion'); *Carroll v. United States*, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543 ('reasonable ground for belief in guilt'). But recently in *Brinegar v. United States*, 338 U. S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879, while deciding a question of probable cause under the search and seizure provisions of the Fourth Amendment, the Court departed from the test of 'suspicion.' However, it alluded to Chief Justice Marshall's statement that the phrase 'means less than evidence which would justify condemnation,' i.e., less than *prima facie* evidence.

"Thus, from these and other decisions it appears correct to conclude that probable cause, as used in this context, is less than *prima facie* proof, but more than mere suspicion. Lying somewhere in the hiatus between these two extremities the semanticist would

find its precise meaning. However, such meticulous precision is not needed for practical application. See *United States v. One Dodge Coupe*, D. C., S. D., N. Y., 43 F. Supp. 60, 62. Suffice it to say that we believe that, if the facts are of such a nature as to support a reasonable belief of a violation of the statute probable cause has been shown.”

The cases are well agreed that in order to show probable cause, a *prima facie* case for forfeiture need not be proved.

United States v. One 1950 Buick Sedan, 231 F. 2d 219 (C. A. 3, 1956);

Ted's Motors v. United States, 217 F. 2d 777 (C. A. 8, 1954);

United States v. 16-54-B Oakland Touring Automobile, 9 F. 2d 635 (D. C. Ariz., 1925).

The courts have also held that hearsay evidence as to the reasons for the institution of the action or forfeiture is admissible and competent with respect to proving probable cause as was stated in *Ted's Motors v. United States*, 217 F. 2d 777, 780 (C. A. 8, 1954):

“We have no doubt that information of guilt, even though hearsay and incompetent with respect to the merits of the case such as the instant one, may constitute probable cause, or, in other words, a reasonable ground for a belief in guilt, justifying the institution of the action. Any other rule would seem to be illogical, unrealistic, and opposed to everyday human experience.” (See cases cited therein.)

On the basis of the foregoing the appellee contends that there is no merit to the appellant's claim of illegal search and seizure and that said protections of the Fourth Amendment do not apply in an *in rem* libel proceeding such as the instant case.

Conclusion.

On the basis of all the foregoing argument and authority the appellee respectfully submits that the decision of the District Court should be affirmed on appeal.

Respectfully submitted,

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Attorneys for Appellee.

No. 16047 ✓

United States
Court of Appeals
for the Ninth Circuit

COLUMBIA IRRIGATION DISTRICT, a cor-
poration, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATE OF WASHINGTON, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeals from the United States District Court for the
Eastern District of Washington,
Southern Division

FILED

OCT 23 1958

PAUL P. O'BRIEN, CLERK

United States
Court of Appeals
for the Ninth Circuit

VS.

VS.

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the
Eastern District of Washington,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, *errors* or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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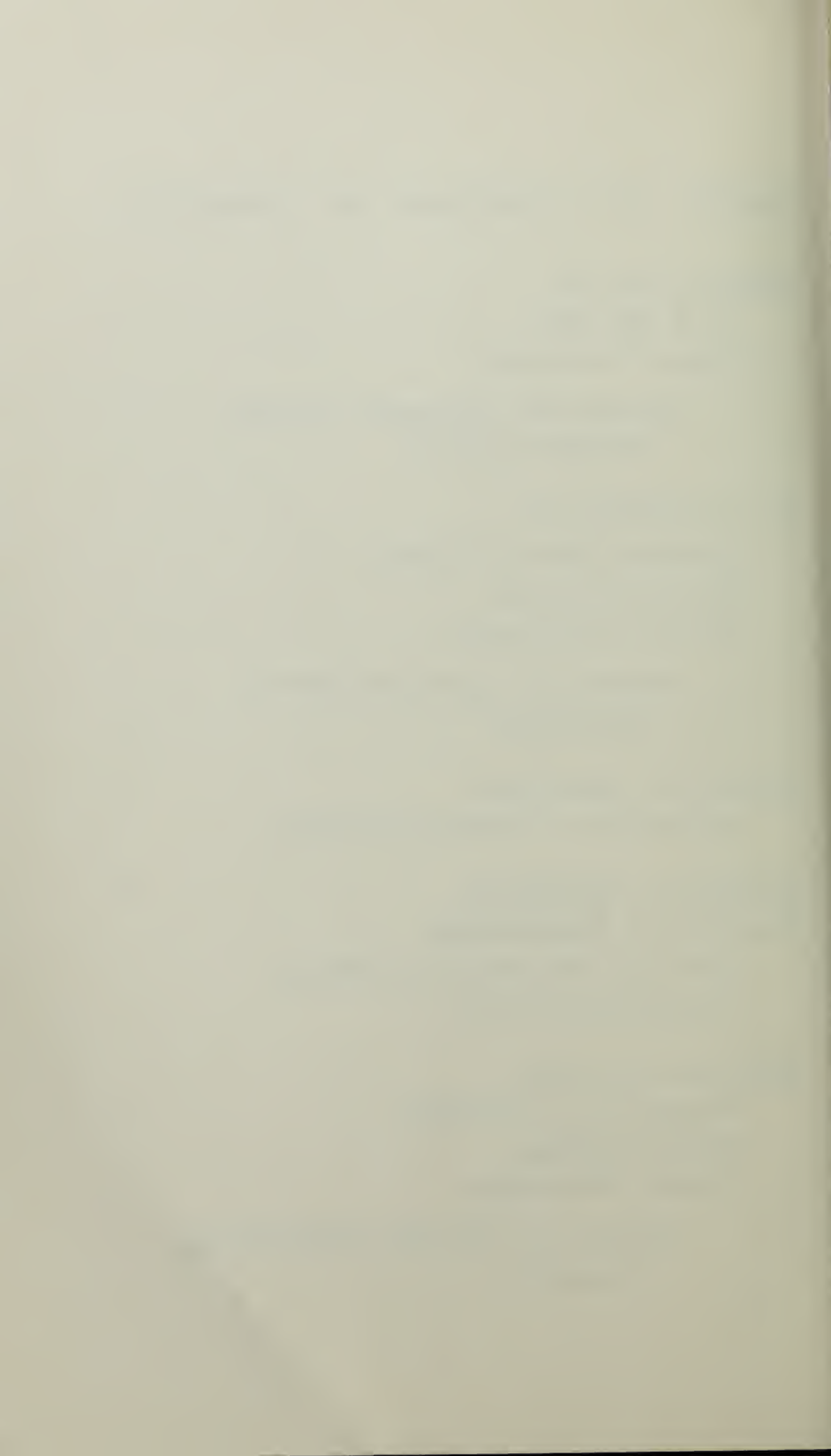
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United States District Court, Eastern District
of Washington, Southern Division

Civil Action No. 765

UNITED STATES OF AMERICA, Plaintiff,

vs.

3,479.73 ACRES OF LAND, MORE OR LESS,
IN BENTON COUNTY, WASHINGTON;
COLUMBIA IRRIGATION DISTRICT, a
municipal corporation; STATE OF WASH-
INGTON; and UNKNOWN OWNERS,

Defendants.

COMPLAINT

1. This is an action of a civil nature brought by the United States of America for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved April 24, 1888 (33 U.S.C. 591), the Act of Congress approved March 1, 1917, as amended, (33 U.S.C. 701 et seq.), the Act of Congress approved October 13, 1949 (Public Law 355—81st Congress) and the Act of Congress approved September 6, 1950 (Public Law 759—81st Congress), which two last-mentioned acts appropriated funds for such taking.

3. The use for which the property is to be taken is for a river improvement for the purposes of navigation, flood control and other purposes incident thereto.

4. The interest to be acquired in the property is all right, title and interest of the Columbia Irrigation District in and to said property.

5. The property taken is described in Exhibit "A" hereto attached.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are:

Columbia Irrigation District, a municipal corporation; State of Washington. [1]*

7. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and such persons are made parties to the action under the designation "Unknown Owners".

Wherefore the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

/s/ HARVEY ERICKSON,
United States Attorney,

/s/ HART SNYDER,
Special Attorney, Department
of Justice,
Attorneys for Plaintiff.

* Page numbers appearing at bottom of page of Original Transcript of Record.

Trial by jury of the issue of just compensation is demanded by plaintiff.

/s/ HARVEY ERICKSON,

United States Attorney,

/s/ HART SNYDER,

Special Attorney, Department
of Justice. [2]

[Endorsed]: Filed December 23, 1952.

United States District Court, Eastern District
of Washington, Southern Division

Civil Action No. 765

UNITED STATES OF AMERICA, Plaintiff,

vs.

3,479.73 ACRES OF LAND, MORE OR LESS,
IN BENTON COUNTY, WASHINGTON:
COLUMBIA IRRIGATION DISTRICT, a
municipal corporation, J. R. AYERS and
ALICE B. AYERS, his wife, WILLIAM J.
EAKIN, JR. and JANE DOE EAKIN, his
wife, LULA F. LIGHTHIZER and JOHN
DOE LIGHTHIZER, her husband, HER-
BERT A. HOVER and MATA C. HOVER,
his wife, STATE OF WASHINGTON, BEN-
TON COUNTY, WASHINGTON, a municipal
corporation, and UNKNOWN OWNERS,

Defendants.

AMENDED COMPLAINT

1. This is an action of a civil nature brought by

the United States of America for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved April 24, 1888 (33 U.S.C. 591), the Act of Congress approved March 1, 1917, as amended (33 U.S.C. 701 et seq.), the Act of Congress approved October 13, 1949, (Public Law 355—81st Congress) and the Act of Congress approved September 6, 1950 (Public Law 759—81st Congress), which two last mentioned acts appropriated funds for such taking.

3. The use for which the property is to be taken is for a river improvement for the purposes of navigation, flood control and other purposes incident thereto.

4. The interests to be acquired in the property are as follows:

a. The fee simple title to the lands in Parcel I, consisting of Tracts F-307, F-320, G-362, H-400, H-404, H-427, H-428, H-429, S-1367, F-321, G-364, H-431 and J-484, subject, however, to existing easements [23] for public roads and highways, for public utilities, for railroads and pipe lines.

b. All right, title and interest of the Columbia Irrigation District in and to the lands in Parcel II, consisting of Segments F, G, H, J, K, L, P, Q, R, S, and T.

c. A perpetual easement and right of way, subject to existing easements for public roads and high-

ways, public utilities, railroads, and pipe lines, to overflow, inundate, saturate, percolate and erode Tract K-538E in Parcel III, with the natural flow of the Columbia River, or the pool created by the present construction of the McNary Dam, or flows resulting from any other cause whatsoever, including flow from any other upstream dam, together with the right to clear and remove natural or artificial structures or obstructions as may be considered necessary by the representative of the United States in charge of the construction, operation, and maintenance of the project, reserving to the owner and its assigns all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements hereby taken provided that no structures for human habitation shall be constructed or maintained on the described lands and provided further that the written consent of the representative of the United States in charge shall be obtained for the type and location of any structures and/or appurtenances thereto now existing or to be erected on said land.

d. A perpetual easement and right of way over Tract K-666E in Parcel III to construct, maintain, repair, operate, patrol, replace and/or remove a drainage ditch together with the right to trim, cut, fell and remove all trees, underbrush, vegetation, structures, obstacles and/or other obstructions within the limits of the right of way.

5. The property so to be taken is described in Exhibit A attached hereto and made a part hereof.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and [24] those whose names have otherwise been learned are:

Parcel I.

Tracts F-307, G-362, H-400, H-404, H-427, H-428, H-429, and S-1367:

Columbia Irrigation District, a municipal corporation, Benton County, Washington, a municipal corporation, State of Washington.

Tracts F-320 and F-321:

Columbia Irrigation District, a municipal corporation, J. R. Ayers and Alice B. Ayers, his wife, William J. Eakin, Jr. and Jane Doe Eakin, his wife, Lula F. Lighthizer and John Doe Lighthizer, her husband, Benton County, Washington, a municipal corporation, State of Washington.

Tract G-364:

Columbia Irrigation District, a municipal corporation, J. R. Ayers and Alice B. Ayers, his wife, Herbert A. Hover and Mata C. Hover, his wife, Benton County, Washington, a municipal corporation, State of Washington.

Tracts H-431 and J-484:

Columbia Irrigation District, a municipal corporation, J. R. Ayers and Alice B. Ayers, his wife, Benton County, Washington, a municipal corporation, State of Washington.

Parcel II.

Segments F, G, H, J, K, L, P, Q, R, S, and T:

Columbia Irrigation District, a municipal corporation, State of Washington.

Parcel III.

Tracts K-666E and K-538E:

Columbia Irrigation District, a municipal corporation, Benton County, Washington, a municipal corporation, State of Washington.

7. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and such persons are made parties to the action under the designation "Unknown Owners".

Wherefore the plaintiff demands judgment that the property be condemned [25] and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper. [26]

/s/ WILLIAM B. BANTZ,
United States Attorney,
/s/ DALE M. GREEN,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

Trial by jury of the issue of just compensation is demanded by plaintiff.

/s/ WILLIAM B. BANTZ,
United States Attorney,
/s/ DALE M. GREEN,
Assistant U. S. Attorney.

EXHIBIT "A"

The land which is the subject matter of this proceeding aggregates 3,425.71 acres, more or less, of which 132.42 acres, more or less, constitutes Parcel I, which is being acquired in fee simple, subject to existing easements for public roads and highways, public utilities, railroads, and pipe lines; 3,292.71 acres, more or less, constitutes Parcel II, as to which all right, title and interest of the Columbia Irrigation District are being acquired; and 0.58 acres, more or less, constitutes Parcel III, over which easement rights are being acquired, all situate and being in the County of Benton, State of Washington.

PARCEL I

Tract F-307

All of the following described parcels of land lying in Section 17, Township 7 North, Range 31 East of the Willamette Meridian in Benton County, Washington, to-wit:

Beginning at a point on the east line of the Spokane, Portland and Seattle Railway Company's right-of-way 50 feet southerly from the point of intersection of said east line of the right-of-way with the north line of said Section 17; thence east 225 feet; thence southerly, parallel with the said east line of the railway right-of-way a distance of 626.36 feet; thence west 225 feet to the said east line of the right-of-way; thence northerly along said east line to the point of beginning.

Also, beginning at a point on the east line of the

Exhibit "A"—(Continued)

Spokane, Portland, and Seattle Railway Company's right-of-way 676.36 feet southerly from the point of intersection of the east line of the right-of-way with the north line of said Section 17; thence southerly along the east line of the right-of-way to a point that is 1,000 feet distant north from the east and west center line of said Section 17; thence east to the Columbia River; thence northerly along said river to a point due east of the point of beginning; thence west to the point of beginning.

Also, the south 1,000 feet of that portion of Government Lot 2 in said Section 17, lying east of the east right-of-way line of the Columbia Irrigation District canal. [27]

There is excepted therefrom the right-of-way of the Spokane, Portland and Seattle Railway Company.

The tract of land above described contains 22.3 acres, more or less.

Tract F-320

A strip of land 125 feet in width, being 62.5 feet on each side of the center line of the Columbia Irrigation District Canal as now constructed over and across Government Lot 3 and that portion of Government Lot 2 lying east of the northerly extension of the west line of said Government Lot 3, all in Section 17, Township 7 North, Range 31 East of the Willamette Meridian, Benton County, Washington.

Exhibit "A"—(Continued)

The tract of land above described contains 4.1 acres, more or less.

Tract G-362

Lots 1, 2 and 3 in Block A, Hover Orchards, according to plat thereof recorded in Volume 1 of Plats, page 42, records of Benton County, Washington.

The tract of land above described contains 0.28 of an acre, more or less.

Tract H-400

Lots 1 to 32, inclusive, of Block 4; Lots 1 to 32, inclusive, of Block 5; Lots 1 to 16, inclusive, of Block 6; Lots 1 to 16, inclusive, of Block 7; all in the Town of Hover, according to the plat thereof recorded in Volume 1 of Plats, page 41, records of Benton County, Washington.

Also Lots 17 to 32, inclusive, of Block 6; Lots 1 to 16, inclusive, of Block 11, all in First Addition to Hover, according to the plat thereof recorded in Volume 1 of Plats, page 44, records of Benton County, Washington.

Also Tracts 10, 11, 13, 14 and 16; all in Assessor's Plat No. 6, according to plat thereof recorded in Volume 2 of Plats, page 77, records of Benton County, Washington.

The tract of land above described contains 26.20 acres, more or less. [28]

Exhibit "A"—(Continued)

Tract H-404

Lots 15 to 24, inclusive, of Block 14; Lots 7 to 12, inclusive, of Block 15; and Tracts 46, 47 and 48; all in First Addition to Hover, according to the plat thereof recorded in Volume 1 of Plats, page 44, records of Benton County, Washington.

Also, Tracts 17 and 18; and all of Tract 12, excepting that portion thereof described as follows:

Beginning at the northwest corner of said Tract 12; thence south 430 feet; thence east 50 feet; thence south 174 feet; thence east to the west right-of-way line of the Spokane, Portland and Seattle Railway Company; thence northwesterly along said right-of-way line to the north line of said Tract 12; thence west 350 feet to the point of beginning.

The said Tracts 12, 17 and 18 are in Assessor's Plat No. 6, according to plat thereof recorded in Volume 2 of Plats, page 77, records of Benton County, Washington.

The tract of land above described contains 12.39 acres, more or less.

Tract H-427

All of Tract 8 in Assessor's Plat No. 6, according to plat thereof recorded in Volume 2 of Plats, page 77, records of Benton County, Washington.

The tract of land above described contains 1.34 acres, more or less.

Tract H-428

All of Tract 19 in Assessor's Plat No. 6, according to plat thereof recorded in Volume 2 of Plats,

Exhibit "A"—(Continued)

page 77, records of Benton County, Washington.

The tract of land above described contains 0.07 of an acre, more or less.

Tract H-429

All that portion of Tract 3 in Assessor's Plat No. 6, according to plat thereof recorded in Volume 2 of Plats, page 77, records of Benton County, Washington, lying between the north line of Second Street extended and the south line of Second Street extended.

The tract of land above described contains 0.54 of an acre, more or less. [29]

Tract S-1367

A tract of land lying in the southeast quarter of Section 23, Township 9 North, Range 28 East of the Willamette Meridian, Benton County, Washington, said tract being more particularly described as follows:

Beginning at a point on the northerly line of the right-of-way of the Main Canal of the Columbia Irrigation District, which point bears North $44^{\circ} 30'$ West from the southeast corner of said Section 23 a distance of 614 feet; thence north 530 feet; thence North $71^{\circ} 41'$ West 2077.8 feet; thence South $28^{\circ} 10'$ West to a point on the northerly right-of-way line of said canal; thence southeasterly along the northerly right-of-way line to the point of beginning.

There is excepted therefrom any portion lying

Exhibit "A"—(Continued)

within the right-of-way of the State Highway No. 3.

The tract of land above described contains 12.2 acres, more or less.

Tract F-321

A tract of land being all that portion lying within the right-of-way of the Main Canal of the Columbia Irrigation District, lying over and across the west half of Section 17, Township 7 North, Range 31 East of the Willamette Meridian, Benton County, Washington, said tract being a strip of land 125 feet in width throughout its entire length, lying westerly and measured at right angles from a line described as follows:

Beginning at a point on the north line of said Section 17, which point lies east, a distance of 9.76 chains from the northwest corner thereof; thence South $44^{\circ} 20'$ East, 4.00 chains; thence South $35^{\circ} 15'$ East, 13.00 chains; and thence South $41^{\circ} 20'$ East, a distance of 30.00 chains, more or less, to a point on the north and south center line of said Section 17, and the Point of Terminus of the above described line.

The tract of land above described contains 8.9 acres, more or less.

Tract G-364

A tract of land being all that portion lying within the right-of-way of the Main Canal of the Columbia Irrigation District, lying over and across the southeast quarter of Section 7 and the southwest

Exhibit "A"—(Continued)

quarter of Section 8, all in Township 7 North, Range 31 East of the Willamette Meridian, Benton County, Washington, said tract being a strip of land 125 feet in width throughout its entire length, lying westerly and measured at right angles from a line described as follows: [30]

Beginning at a point on the north line of the said southeast quarter of Section 7, which point lies west, a distance of 11.49 chains from the northeast corner thereof; thence by the following courses and distances:

South $35^{\circ} 30'$ West, 3.78 chains;

South $25^{\circ} 00'$ East, 10.00 chains;

South $7^{\circ} 00'$ East, 7.80 chains;

South $41^{\circ} 40'$ East, 13.00 chains;

and thence South $44^{\circ} 20'$ East, a distance of 14.00 chains, to a point on the south line of the said southwest quarter of Section 8, which point lies east, a distance of 9.76 chains, from the southwest corner thereof, and the Point of Terminus of the above described line.

The tract of land above described contains 9.2 acres, more or less.

Tract H-431

A tract of land being all that portion lying within the right-of-way of the Main Canal of the Columbia Irrigation District, lying over and across the northeast quarter of Section 7, Township 7 North, Range 31 East of the Willamette Meridian, Benton County, Washington, said tract being a

Exhibit "A"—(Continued)

strip of land 125 feet in width throughout its entire length, lying westerly and measured at right angles from a line described as follows:

Beginning at a point on the north line of the said northeast quarter of Section 7, which point lies west, a distance of 19.51 chains, from the northeast corner thereof; thence by the following courses and distances:

South $38^{\circ} 00'$ East, 17.34 chains;

South $26^{\circ} 15'$ East, 7.00 chains;

South $11^{\circ} 30'$ East, 6.00 chains;

South $16^{\circ} 00'$ West, 5.00 chains;

South $48^{\circ} 20'$ West, 4.52 chains;

and thence South $23^{\circ} 20'$ West, a distance of 6.25 chains, to a point on the south line of the said northeast quarter, which point lies west, a distance of 11.49 chains, from the southeast corner thereof, and the Point of Terminus of the above described line.

The tract of land above described contains 8.7 acres, more or less. [31]

Tract J-484

A tract of land being all that portion lying within the right-of-way of the Main Canal of the Columbia Irrigation District, lying over and across Section 1 in Township 7 North, Range 30 East of the Willamette Meridian, and Section 6 in Township 7 North, Range 31 East of the Willamette Meridian, all in Benton County, Washington, said tract being a strip of land 125 feet in width throughout its

Exhibit "A"—(Continued)

entire length, lying westerly and measured at right angles from a line described as follows:

Beginning at a point on the north line of said Section 1, which point lies west, a distance of 16.88 chains, from the northeast corner of the northwest quarter of the northeast quarter of said Section 1; thence over and across said Section 1 by the following courses and distances:

South $4^{\circ} 30'$ East, 3.00 chains;
South $75^{\circ} 30'$ East, 7.00 chains;
South $40^{\circ} 00'$ East, 7.00 chains;
North $85^{\circ} 00'$ East, 5.50 chains;
South $49^{\circ} 00'$ East, 9.00 chains;
South $63^{\circ} 00'$ East, 10.44 chains;

and thence South $50^{\circ} 00'$ East, a distance of 5.28 chains, to a point on the section line common to Section 1 of said Township and Range and Section 6 of said Township and Range; thence over and across said Section 6 by the following courses and distances:

South $53^{\circ} 00'$ East, 19.15 chains;
North $71^{\circ} 05'$ East, 7.00 chains;
South $82^{\circ} 00'$ East, 11.00 chains;
South $39^{\circ} 00'$ East, 13.00 chains;
South $7^{\circ} 40'$ East, 14.45 chains;
South $48^{\circ} 15'$ East, 10.00 chains;

and thence South $30^{\circ} 30'$ East, a distance of 16.40 chains, to a point on the south line of said Section 6, which point lies west, a distance of 19.51 chains

Exhibit "A"—(Continued)

from the southeast corner thereof, and the Point of Terminus of the above described line.

The tract of land above described contains 26.2 acres, more or less. [32]

PARCEL II

Segment F

That portion of Section 17, Township 7 North, Range 31 East of the Willamette Meridian, Benton County, Washington, described as follows:

Beginning at a point where the easterly line of the Columbia Irrigation District's Main Canal intersects the north line of said Section 17; thence east along said north line to a point on the right bank of the Columbia River; thence southerly along said right bank to a point on the south line of Government Lot 3 of said Section 17; thence west to the southwest corner of said Government Lot 3; thence north along the west line of said Government Lot 3 to a point on the easterly line of the right-of-way of the said Columbia Irrigation District's Main Canal; thence northerly along said easterly line to the point of beginning.

The segment of land above described contains 102.8 acres, more or less.

Segment G

That portion of Sections 7 and 8, Township 7 North, Range 31 East of the Willamette Meridian, Benton County, Washington, described as follows:

Beginning at a point where the north line of the southeast quarter of said Section 7 intersects the

Exhibit "A"—(Continued)

easterly line of the right-of-way of the Columbia Irrigation District's Main Canal; thence east to a point on the west line of the plat of the First Addition to Hover (according to the plat thereof recorded in Volume 1, page 44, Plat Records); thence south along said west line to a point on the south line of Seventh Street of the said First Addition to Hover; thence east along said south line of Seventh Street to a point on the right bank of the Columbia River; thence southerly along said right bank to a point on the south line of Section 8; thence west along said south line to a point on the easterly line of the right-of-way of the Columbia Irrigation District's Main Canal; thence northerly along said easterly line to the point of beginning.

The segment of land above described contains 129.92 acres, more or less. [33]

Segment H

That portion of Sections 7 and 8, Township 7 North, Range 31 East of the Willamette Meridian, Benton County, Washington, described as follows:

Beginning at a point where the easterly line of the right-of-way of the Columbia Irrigation District's Main Canal intersects the north line of said Section 7; thence east along the north line of said Section 7 and Section 8 to a point on the right bank of the Columbia River; thence southerly along said right bank to the south line of Seventh Street of the Town of Hover (according to the plat thereof recorded in Volume 1, page 41, Plat

Exhibit "A"—(Continued)

Records); thence west along the south line of said Seventh Street to the southwest corner of the plat known as the First Addition to Hover (according to the plat thereof recorded in Volume 1, page 44, Plat Records); thence north along the west line of said plat to a point on the south line of the northeast quarter of said Section 7; thence west along said south line to a point on the easterly line of the right-of-way of the Columbia Irrigation District's Main Canal; thence northerly along said easterly line to the point of beginning.

The segment of land above described contains 168.48 acres, more or less.

Segment J

That portion of Townships 7 and 8 North, Ranges 30 and 31 East of the Willamette Meridian, Benton County, Washington, described as follows:

Beginning at the northwest corner of Section 36, Township 8 North, Range 30 East of the Willamette Meridian; thence east along the north line of said Section 36 to a point on the right bank of the Columbia River; thence southerly along said right bank to a point on the south line of Section 5, Township 7 North, Range 31 East of the Willamette Meridian; thence west along the south line of said Section 5 and Section 6, Township 7 North, Range 31 East of the Willamette Meridian, to a point on the northeasterly line of the right-of-way of the Columbia Irrigation District's Main Canal; thence northwesterly along said northeasterly line

Exhibit "A"—(Continued)

to a point on the west line of said Section 36, Township 8 North, Range 30 East of the Willamette Meridian; thence north along said west line to the point of beginning.

Also a strip of land 125 feet in width, being 62.5 feet on each side of the center line of the right-of-way of Main Canal of the Columbia Irrigation District as now constructed over and across the south half of Section 36, Township 8 North, Range 30 East of the Willamette Meridian, Benton County, Washington.

The segment of land above described contains 986.14 acres, more or less. [34]

Segment K

That portion of Sections 4, 5, 6, 9, 10, 11, 14, 16, 23, 24 and 25 all in Township 8 North, Range 30 East of the Willamette Meridian, Benton County, Washington, described as follows:

Beginning at a point on the line of ordinary high water lying on the westerly (right) bank of the Columbia River, which point lies on the south line of said Section 25; thence westerly along the said south line of Section 25; to a point lying east, a distance of 1556.22 feet, from the southwest corner of said Section 25 and which point lies on a line lying parallel with and westerly, a distance of 30 feet, measured at right angles to a traverse line bearing North $4^{\circ} 16'$ East from a coordinate point, said coordinate point lying South $64^{\circ} 53' 07.6''$ East, a distance of 1690.03 feet from the southwest cor-

Exhibit "A"—(Continued)

ner of said Section 25; thence northerly parallel with and 30 feet distant westerly from said traverse line, which traverse line continues as follows: North $4^{\circ} 16'$ East, to a point lying 1909.3 feet from said coordinate point; thence along a 5° curve to the right, a distance of 285.4 feet, to a point at which the said parallel line extends westerly from a distance of 30 feet to a distance of 128 feet (measured radially) from the described traverse line; thence continuing along a line lying parallel with and 128 feet distant westerly from the described traverse line which traverse line continues as follows: along the remainder of said 5° curve to the right, a distance of 139.3 feet; thence North $25^{\circ} 30'$ West, 1580.6 feet; thence along a 8° curve to the left 599.4 feet; thence North $22^{\circ} 27'$ West, a distance of 2380.7 feet, at which point the said westerly parallel line descends from a distance of 128 feet to a distance of 100 feet, measured at right angles from the described traverse line; thence continuing along a line lying parallel with and 100 feet distant westerly from the described traverse line, which traverse line continues as follows: along the remainder of said bearing of North $22^{\circ} 27'$ West, 556.9 feet; thence along a 6° curve to the left 373.3 feet; thence North $44^{\circ} 51'$ West 1199.6 feet; thence along a 3° curve to the right 464.4 feet; thence North $30^{\circ} 55'$ West a distance of 180 feet, to a point at which the said westerly parallel line intersects the west line of Government Lot 4 in said Section 24 measured at approximate right

Exhibit "A"—(Continued)

angles and a distance of 100 feet westerly from the described traverse line; thence north along said west line, a distance of 30 feet, more or less, to the northwest corner of said Government Lot 4; thence east along the north line of said Lot 4, a distance of 50 feet, more or less, to a point on a line lying parallel with and westerly, a distance of 36 feet, measured at right angles to the continuation of the described traverse line; thence along said parallel line and 36 feet distant westerly from the traverse line, which traverse line continues North $30^{\circ} 55'$ West, a distance of 325.8 feet, at which point the said westerly parallel line extends westerly from a distance of 36 feet to a distance of 67 feet, measured at right angles from the described traverse line; thence continuing along a line lying parallel with and 67 feet distant westerly from the described traverse line, [35] which traverse line continues North $30^{\circ} 55'$ West, a distance of 845.28 feet at which point the said westerly parallel line intersects a line bearing South $79^{\circ} 12' 50.8''$ West, at a distance of 67 feet, measured at right angles from the described traverse line; thence along said line bearing South $79^{\circ} 12' 50.8''$ West, 467.67 feet; thence South $79^{\circ} 32' 52.9''$ West, a distance of 319.44 feet, to a point on the west line of the southeast quarter of the northeast quarter of said Section 23; thence North $1^{\circ} 02' 29.8''$ West along said west line, a distance of 497.29 feet, to the northwest corner of said subdivision; thence South $89^{\circ} 56' 45.3''$ East along the north line of said subdivision,

Exhibit "A"—(Continued)

a distance of 580 feet; thence north, a distance of 250 feet; thence northwesterly to a point on the south line of the southwest quarter of the southeast quarter of said Section 14, which point lies east, a distance of 40 feet, from the southwest corner thereof; thence west, a distance of 40 feet, to the said southwest corner thereof; thence north along the west line of the said southwest quarter of the southeast quarter, a distance of 60 feet; thence northwesterly to a point on the east line of the west half of the east half of the southeast quarter of the southwest quarter of said Section 14, which point lies north, a distance of 260 feet, from the southeast corner of the above said subdivision; thence continuing northwesterly to a point on the west line of the above said subdivision, which point lies north, a distance of 460 feet, from the southwest corner thereof; thence northwesterly to a point on the easterly line of the right-of-way of the existing main canal of the Columbia Irrigation District lying over and across the southwest quarter of the southwest quarter of said Section 14, said point lying north, a distance of 900 feet, from the south line of the said southwest quarter of the southwest quarter; thence north along the said easterly right-of-way line to a point on the north line of the said southwest quarter of the southwest quarter; thence east along the said north line to the northeast corner thereof; thence north along the west line of the north-

Exhibit "A"—(Continued)

east quarter of the said southwest quarter of Section 14 to a point on the southerly line of the right-of-way of the Yakima Branch of the Oregon-Washington Railroad and Navigation Company (U.P.R.R. Co.); thence easterly along said southerly right-of-way line to a point lying opposite Railway Survey Station 1859+00; thence northwesterly and at right angles across said railroad right-of-way at said survey station to a point on the northerly line of said right-of-way; thence northeasterly along the said northerly right-of-way line to a point lying opposite Railway Survey Station 1860+10.0; thence North $44^{\circ} 45' 08''$ West, a distance of 1764.96 feet, more or less, to a point lying on the southeasterly line of Lot 5 of the Replat of Donelson's Plat (according to the plat thereof recorded in Volume 4, Page 19, Plat Records) in said Section 14, which point lies northeasterly, a distance of 757.1 feet, from the south corner of said Lot 5; thence northeasterly along the said southeasterly line of Lot 5, a distance of 34 feet; thence North $46^{\circ} 32' 40''$ West, a distance of 200 feet, to a point on the northwesterly line of Lot 1 of said Replat of Donelson's Plat; thence South $43^{\circ} 27' 20''$ West, along the said northwesterly line of Lot 1, a distance of 42 feet; thence North $44^{\circ} 02' 48''$ West, 424.96 feet; thence North $40^{\circ} 24' 47''$ West, a distance of 230 feet, more or less, to a point on the northeasterly line of the right-of-way of the dedicated road (Columbia River Road) as shown on said plat; thence southwesterly at right

Exhibit "A"—(Continued)

angles to said road right-of-way, a distance of 40 feet, more or less, to a point on the southwesterly line of said road right-of-way, thence northwesterly, along the said southwesterly line of the right-of-way to a point on the southerly line of the right-of-way of the existing spillway of the Columbia Irrigation District lying in Government Lot 1 of said Section 14; thence northeasterly along the said southerly right-of-way line to a point on the line of ordinary high water along the right (westerly) bank of the Columbia River; thence northwesterly along the said line of ordinary high water, a distance of 55 feet, more or less, to a point on the northerly line of the right-of-way of said existing spillway; thence southwesterly along the said northerly right-of-way line to a point lying 255.4 feet from the easterly line of the existing right-of-way of the Main Canal of the said Columbia Irrigation District (measured along the said northerly right-of-way line of the spillway); thence deflect an angle of $100^{\circ} 21'$ to the right [36] northwesterly, a distance of 100 feet, more or less, to a point on the southerly line of the right-of-way of the existing County Road No. 375; thence North $63^{\circ} 39'$ West, a distance of 760 feet, more or less, to a point on a line lying parallel with and north, a distance of 274.8 feet, from the south line of Government Lot 5 in said Section 11; thence west along said parallel line, a distance of 95 feet, more or less, to a point on the west line of said Government Lot 5; thence north along the said west

Exhibit "A"—(Continued)

line to a point lying north, a distance of 400 feet, from the southwest corner of said Government Lot 5; thence northwesterly to a point on the west line of Government Lot 4 in said Section 10, which point lies north, a distance of 940 feet, from the southwest corner thereof; thence continuing northwesterly to a point lying on the east line of the west half of the southwest quarter of the southeast quarter of said Section 10, which point lies north, a distance of 1210 feet, from the southeast corner thereof; thence continuing northwesterly to a point lying on the north line of the southwest quarter of the southeast quarter of said Section 10, which point lies east, a distance of 350 feet, from the northwest corner thereof; thence west along the said north line to the said northwest corner thereof; thence continuing west along the south line of the northeast quarter of the southwest quarter of said Section 10, to the southwest corner of the east half of the said northeast quarter of the southwest quarter; thence north along the west line of the said east half, a distance of 300 feet; thence northwesterly to a point on the section line common to said Sections 9 and 10, which point lies north, a distance of 750 feet, from the southwest corner of the northwest quarter of the southwest quarter of said Section 10; thence north along the said section line to a point lying south, a distance of 165 feet, from the southeast corner of Government Lot 2 in said Section 9; thence northwesterly to a point on the south line of said Government Lot 2, which point

Exhibit "A"—(Continued)

lies west, a distance of 165 feet, from the said southeast corner thereof; thence east along said south line, a distance of 135 feet; thence northwesterly, a distance of 425 feet, more or less, to a point described as follows:

Commencing at a point on the Washington Coordinate System, South Zone, the y coordinate of said point being North 317,657.00 feet and the x coordinate being East 2,366,513.87 feet (said coordinate point lying approximately 265 feet north and 175 feet east from the southeast corner of said Government Lot 2); thence North $65^{\circ} 30'$ West, a distance of 460.7 feet; thence South $24^{\circ} 30'$ West, a distance of 160 feet, to the above said point.

thence bearing North $65^{\circ} 30'$ West from the above described point, a distance of 2400 feet, more or less, to a point of intersection with the south line of Government Lot 6 in said Section 4; thence west along the said south line to the southwest corner thereof; thence north along the west line of said Government Lot 6, a distance of 39.97 feet; thence northwesterly to a point lying on the east line of the southwest quarter of the southwest quarter of said Section 4, which point lies north, a distance of 1013.92 feet, from the southeast corner thereof; thence northwesterly to a point on the north line of the said southwest quarter of the southwest quarter, which point lies east, a distance of 828.94 feet, from the northwest corner thereof; thence North $56^{\circ} 08'$ West, 745.22 feet; thence

Exhibit "A"—(Continued)

North $59^{\circ} 02'$ West, 399.80 feet; thence North $30^{\circ} 58'$ East, 9.78 feet; thence northwesterly, a distance of 147.82 feet, more or less, to a point on the north line of Tract 2 of Pratt's Replat of Tract 1 of Chicago Ten Acre Tracts (according to the plat thereof recorded in Volume 2, Page 88, Plat Records) in said Section 5, which point lies east, a distance of 185.68 feet, from the northwest corner [37] of said Tract 2; thence northwesterly to a point on the west line of Tract 3 of said Pratt's Replat, which point lies north, a distance of 465 feet, from the southwest corner of said Tract 3; thence northwesterly to a point lying on the west line of the north half of the east half of that portion of Tract 2 of Chicago Ten Acre Tracts (according to the plat thereof recorded in Volume 1, page 46, Plat Records) lying south of the Highway running east and west across said Tract 2, which point lies north, a distance of 325 feet from the southwest corner thereof; thence north, along said west line, a distance of 20 feet, more or less, to the south line of the right-of-way of the said Highway lying over and across said Tract 2; thence west along the said south line of the Highway a distance of 110 feet, more or less, to a point on a line lying parallel with and east, a distance of 220 feet, from the west line of said Tract 2 of said Chicago Ten Acre Tracts; thence north along said parallel line, a distance of 51.65 feet; thence northwesterly over Tract 3 of said Chicago Ten Acre Tracts by the following courses and distances:

Exhibit "A"—(Continued)

North 63° 48' West, 330.0 feet;

North 26° 12' East, 5.0 feet;

North 63° 48' West, 100.0 feet;

South 26° 12' West, 5.0 feet;

and thence North 63° 48' West, a distance of 545.0 feet, to a point on the west line of said Tract 3, which point lies north, a distance of 498.04 feet, from the center line of the Highway running east and west across said Tract 3; thence south along said west line to the center line of said Highway; thence west along the center line of said Highway abutting the south line of Tracts 4 and 5 of said Chicago Ten Acre Tracts, to a point on the southerly extension of the west line of said Tract 5; thence north along the said southerly extension and said west line, to a point lying north, a distance of 390 feet, from the southeast corner of Tract 6 of said Chicago Ten Acre Tracts; thence northwesterly to a point on the west line of said Tract 6, which point lies north, a distance of 610 feet, from the southwest corner thereof; thence north along said west line to a point of intersection with a line lying parallel with and southerly, a distance of 160 feet, measured at right angles from a traverse line which point of beginning is described as follows:

Commencing at a point on the Washington Coordinate System, South Zone, the y coordinate of said point being North 322,710.0 feet, and the x coordinate of said point being East 2,356,902.30 feet (said coordinate point lying approximately

Exhibit "A"—(Continued)

785 feet north and 20 feet east from the southwest corner of said Tract 6); thence South $64^{\circ} 55'$ East, a distance of 100 feet, to the True Point of Beginning of said traverse line.

thence northwesterly parallel with and 160 feet distant southerly from said traverse line which traverse line bears North $64^{\circ} 55'$ West from its above described true point of beginning, a distance of 1186.0 feet, at which point the said southerly parallel line descends from a distance of 160 feet to a distance of 115 feet, measured at right angles to the described traverse line; thence continuing along a line lying parallel with and 115 feet southerly from the described traverse line which continues North $64^{\circ} 55'$ West, a distance of 250 feet, at which point the said southerly parallel line extends southerly from a distance of 115 feet, to a distance of 160 feet, measured at right angles from the described traverse line; thence continuing along a line lying parallel with and 160 feet southerly from the described traverse line which continues North $64^{\circ} 55'$ West, a distance of 75 feet, more or less, to a point at which the said southerly parallel line intersects the east [38] line of Tract 9 in Hover's Villa Tracts (according to the plat thereof recorded in Volume 1, Page 19, Plat Records) in said Section 6; thence south along the said east line of Tract 9 to a point lying north, a distance of 125 feet, from the southeast corner thereof; thence northwesterly, to a point on a line lying parallel

Exhibit "A"—(Continued)

with and north, a distance of 242.67 feet, from the south line of Tract 8 of said Hover's Villa Tracts and which point lies west, a distance of 85 feet, from the east line of said Tract 8; thence west along said parallel line to the west line of said Tract 8; thence continuing west along the westerly extension of said parallel line, across Nutmeg Street, to the east line of Tract 7 of said Hover's Villa Tracts; thence north along said east line of Tract 7, to a point lying north, a distance of 312.67 feet, from the southeast corner of said Tract 7; thence northwesterly to a point on the east line of Tract 3 of said Hover's Villa Tracts, which point lies north, a distance of 180 feet, from the southeast corner of said Tract 3; thence north along the said east line of said Tract 3 to a point on a line lying parallel with and north, a distance of 210 feet, from the south line of said Tract 3; thence west along the said parallel line, to a point on the easterly line of the right-of-way of the Spokane, Portland and Seattle Railway Company; thence northeasterly along said easterly line, a distance of 60 feet, more or less, to a point on a line bearing North $54^{\circ} 51'$ West; thence along said line bearing North $54^{\circ} 51'$ West, a distance of 50 feet, more or less, to a point of intersection with the easterly line of the right-of-way of the Northern Pacific Railway Company; thence northeasterly, east and northeasterly along said right-of-way line to the right (westerly) bank of the Columbia River; thence southeasterly along the said river bank, to the point

Exhibit "A"—(Continued)

of intersection with the south line of said Section 25 and the point of beginning.

Also a parcel of land lying in the southwest quarter of the southwest quarter of said Section 9 and the northwest quarter of the northwest quarter of said Section 16, said parcel being more particularly described as follows:

Beginning at the southwest corner of said Section 9, thence north along the west line thereof, a distance of 150 feet; thence east along a line lying parallel with the south line of said Section 9 to a point on the west line of the southeast quarter of the said southwest quarter of the southwest quarter of Section 9; thence north along said west line to a point on a line lying parallel with and southwesterly, a distance of 150 feet, measured at right angles, from the center line of the main track of the railroad of the Spokane, Portland and Seattle Railway Company; thence southeasterly along said parallel line to a point on a line which lies parallel with and northwesterly, a distance of 20 feet, measured at right angles, from the center line of the existing right-of-way of the McNary-Pasco Transmission Line as the same is located over and across the said northwest quarter of the northwest quarter of Section 16; thence southwesterly along the last described parallel line, a distance of 185 feet; thence northwesterly, a distance of 260 feet, more or less, to a point on the section line common to said Sections 9 and 16; thence west along said Sec-

Exhibit "A"—(Continued)

tion line, a distance of 860 feet, more or less, to the point of beginning.

The segment of land above described contains 700.74 acres, more or less.

Segment L

That portion of Section 36, Township 9 North, Range 29 East of the Willamette Meridian, and Section 31, Township 9 North, Range 30 East of the Willamette Meridian, Benton County, Washington, described as follows:

Beginning at a point where the easterly line of the right-of-way of the Northern Pacific Railway Company intersects the [39] right (southerly) bank of the Columbia River; thence southwesterly along said easterly right-of-way line to a point on the south line of said Section 31; thence west along the south line of said Section 31 to a point of intersection with the southerly line of the right-of-way of Levee 5 D as shown on Corps of Engineers, U. S. Army, Construction Drawing No. MDL-1-0-5/7; thence northwesterly along said southerly right-of-way line to the point of intersection with the 338 foot contour line (above M.S.L.), which point lies approximately on the east line of, and northerly, a distance of 580 feet, from the southeast corner of Tract 8 of the Replat of Columbia Gardens in the Town of Kennewick, Washington, (according to the plat thereof recorded in Volume 2, Page 92, Plat Records); thence southwesterly and northwesterly along said 338 foot contour line lying

Exhibit "A"—(Continued)

across the said Replat of Columbia Gardens to a point on the west line of Tract 3 of said Replat of Columbia Gardens, which point lies north, a distance of 650 feet, from the southwest corner of said Tract 3; thence west across Washington Street in the said Town of Kennewick, to a point on the west line of said street, which point lies north, a distance of 880 feet, from the south line of said Section 31; thence north along said west line to a point lying north, a distance of 400 feet, from the southeast corner of Tract 1 of Columbia Gardens in said Town of Kennewick (according to the plat thereof recorded in Volume 1, Page 52, Plat Records); thence westerly across said Tract 1, to a point on the west line of said Tract 1, which point lies north, a distance of 425 feet, from the southwest corner thereof; thence west to a point on the center line of Auburn Street in said Town of Kennewick; thence south along said center line to a point on the easterly extension of the north line of the south 80 feet of Tract "Q" in the Northern Pacific Irrigation Company's Amended Plat of said Town of Kennewick (according to the plat thereof recorded in Volume 1, Page 70, Plat Records); thence west along said easterly extension and the said north line of the south 80 feet, to a point lying west, a distance of 78 feet, from the east line of said Tract "Q"; thence north, parallel with the said east line of Tract "Q", a distance of 40 feet; thence northwesterly to a point lying on the west line of said Tract "Q", which point lies north, a

Exhibit "A"—(Continued)

distance of 280 feet, from the southwest corner thereof; thence north along the said west line to a point on the easterly extension of the south line of Lot 18 in Desgranges Addition in the said Town of Kennewick (according to the plat thereof recorded in Volume 3, Page 91, Plat Records); thence west along the said easterly extension, the said south line of Lot 18, and the westerly extension thereof, to a point on the center line of Cascade Street in said Desgranges Addition; thence north along said center line to a point on the easterly extension of the south line of Lot 3 of said Desgranges Addition; thence west along said easterly extension, the said south line of Lot 3, and the westerly extension thereof, to a point on the west line of said Desgranges Addition; thence north along said west line to a point lying north, a distance of 60 feet, from the southeast corner of Tract "N" of the said Northern Pacific Irrigation Company's Amended Plat; thence northwesterly to a point on the west line of the east 193 feet of said Tract "N", which point lies north, a distance of 150 feet, from the south line of said Tract "N"; thence continuing northwesterly to a point lying on east line of the west 199 feet of said Tract "N", which point lies on a line lying parallel with and north, a distance of 202 feet from the south line of said Tract "N"; thence west along said parallel line, a distance of 110 feet; thence north 58 feet; thence west, 30 feet; thence north, 15 feet; thence west, a distance of 59 feet,

Exhibit "A"—(Continued)

to a point on [40] the west line of said Tract "N", which point lies north, a distance of 275 feet, from the southwest corner thereof; thence continuing west to a point on the center line of North Everett Street in said Town of Kennewick; thence north along the said center line to a point lying due east from a point on the east line of Tract "L" of said Northern Pacific Irrigation Company's Plat, which point lies north, a distance of 300 feet, from the southeast corner thereof; thence west to the said point on the east line of Tract "L"; thence northwesterly to a point lying on the north line of said Tract "L", which point lies east, a distance of 412.57 feet from the northwest corner thereof; thence west along the said north line of Tract "L" to a point lying due south from a point lying on the south line of Tract "M" of said Northern Pacific Irrigation Company's Plat, which point lies west, a distance of 269 feet, from the southeast corner of said Tract "M"; thence north, a distance of 20 feet, to a point on the center line of "E" Street (now West Innaha Avenue) of the said Northern Pacific Irrigation Company's Plat; thence west along said center line to the point of intersection with the northerly line of the right-of-way of State Highway No. 3, U.S. No. 410 (also known as Columbia Avenue); thence northwesterly along said northerly line to a point lying north, a distance of 115 feet, from the south line of said Tract "M"; measured at right angles thereto; thence continuing northwesterly to a point lying on the

Exhibit "A"—(Continued)

northerly extension of the west line of North Fruitland Street in said Town of Kennewick, which point lies north, a distance of 200 feet, from the south line of said Tract "M"; thence continuing northwesterly to a point on the west line of said Tract "M", which point lies north, a distance of 230 feet, from the southwest corner thereof; thence northwesterly to a point lying on the east line of Lot 16 in Delmar's Addition to Kennewick (according to the plat thereof recorded in Volume 3, page 11, Plat Records), which point lies north, a distance of 40 feet, from the southeast corner of said Lot 16; thence northwesterly to a point lying on the north line of Lot 17 in said Delmar's Addition, which point lies east, a distance of 58 feet, from the northwest corner thereof; thence west along the said north line and the westerly extension thereof to a point on the center line of Garfield Street in said Delmar's Addition; thence north along the said center line, a distance of 50 feet, to a point on the easterly extension of the south line of Lot 3 of said Delmar's Addition; thence west along the said easterly extension and the said south line of Lot 3 to a point lying west, a distance of 60 feet, from the southeast corner of said Lot 3; thence north, a distance of 50 feet, to the southeast corner of Lot 1 in said Delmar's Addition, which lies on the north line of said Lot 3; thence continuing north along the east line of said Lot 1, a distance of 10 feet; thence west along a line lying parallel with the south line of said Lot 1 and the

Exhibit "A"—(Continued)

westerly extension thereof, to a point on the west line of said Delmar's Addition; thence north along the said west line to a point lying on the easterly extension of the northerly line of Block 2 of Yakima Irrigating and Improvement Company's Plat of Kennewick (according to the plat thereof recorded in Volume 1, page 9, Plat Records); thence [41] northwesterly along said easterly extension, the said northerly line of Block 2 and the westerly extension thereof, to a point on the east line of Tract 7 of Kennewick Gardens (according to the plat thereof recorded in Volume 1, page 16, Plat Records); thence continuing northwesterly to a point lying on the east line of the west 256.78 feet of said Tract 7, which point lies north, a distance of 240 feet, from the south line of said Tract 7; thence northwesterly to a point on a line lying parallel with and south, a distance of 110 feet, from the north line of said Tract 7, which point lies east, a distance of 136 feet, from the west line of said Tract 7; thence west along the said parallel line, a distance of 136 feet, to the said west line of Tract 7; thence south along the said west line and the southerly extension thereof to the center line of "F" Street (now Klamath Avenue) of said Kennewick Gardens; thence west along said center line, a distance of 50 feet, to a point on a line lying parallel with the said west line and the southerly extension thereof; thence north along said parallel line, to a point on a line that intersects the west line of said Tract 7 at a point lying south, a dis-

Exhibit "A"—(Continued)

tance of 70 feet, from the northwest corner thereof, and that intersects the north line of Tract 8 in said Kennewick Gardens at a point lying west, a distance of 120 feet, from the northeast corner thereof; thence northwesterly along the above described line, to the north line of said Tract 8; thence north, a distance of 20 feet, to the center line of "G" Street (now Metaline Avenue) of said Kennewick Gardens; thence west along the said center line to a point on the southerly extension of a line, that intersects the south line of Tract 6 of said Kennewick Gardens at a point lying east, a distance of 287 feet, from the southwest corner thereof, and that intersects the north line of said Tract 6 at a point lying east, a distance of 291 feet, from the west line of said Tract 6; thence north along the above described said southerly extension and along said line to a point lying north, a distance of 50 feet, from the south line of said Tract 6; thence northwesterly to a point on a line lying parallel with and north, a distance of 240 feet, from the south line of Tract 5 in said Kennewick Gardens, which point lies east, a distance of 466 feet, from the west line of said Tract 5; thence west along the said parallel line, a distance of 466 feet, to the said west line of Tract 5; thence north along the said west line of said Tract 5 and the northerly extension thereof, to the center line of "H" Street (now West Okanogan Avenue) in said Kennewick Gardens; thence east along the said center line to the point of intersection with the southerly line

Exhibit "A"—(Continued)

of the right-of-way of State Highway No. 3 (U.S. No. 410) (also known as Columbia Avenue); thence due north to a point on the right (southerly) bank of the Columbia River; thence easterly along the said right bank to a point on the easterly line of the said right-of-way of the Northern Pacific Railway Company and the point of beginning.

The segment of land above described contains 26.12 acres, more or less. [42]

Segment P

That portion of Sections 35 and 36, Township 9 North, Range 29 East of the Willamette Meridian, Benton County, Washington, described as follows:

Beginning at a point where the west line of Giards' Orchard (according to the plat thereof recorded in Volume 3, page 48, Plat Records) intersects the south line of the right-of-way of State Highway No. 3 (U.S. No. 410); thence easterly along said south line to a point on the east line of Government Lot 3 of said Section 35; thence north along said east line to a point on the right bank of the Columbia River; thence easterly along said right bank to a point on a line, which extends due north from a point lying where the south line of the right-of-way of said State Highway No. 3 intersects the center line of "H" Street (now known as West Okanogan Avenue) of Kennewick Gardens (according to the plat thereof recorded in Volume 1, page 16, Plat Records); thence south along the said extended line to the said point of intersection

Exhibit "A"—(Continued)

with the center line of said "H" Street; thence west along the said center line of "H" Street to a point lying on northerly extension of the east line of the west 280.86 feet of Tract 3 of said Kennewick Gardens; thence south along the said northerly extension, the said east line and the southerly extension thereof, to a point on the center line of "G" Street (now known as West Metaline Avenue) of said Kennewick Gardens; thence west along the said center line of "G" Street to a point on the northerly extension of the west line of the east 311.14 feet of Tract 11 in said Kennewick Gardens; thence south along the said northerly extension, the said west line and the southerly extension thereof, to a point on the center line of "F" Street (now known as West Klamath Avenue) of said Kennewick Gardens; thence west along the said center line of "F" Street, a distance of 227.50 feet, more or less, to a point on the west line of said Section 36; thence continuing west along the westerly extension of the said center line, a distance of 50 feet, to a point on the northerly extension of the east line of Block 1 in Vineyard Plat (according to the plat thereof recorded in Volume 3, page 60, Plat Records); thence south along the said northerly extension, the said east line and the southerly extension thereof, to a point on the center line of Giard Avenue (now known as West John Day Avenue) in said Vineyard Plat; thence west along the said center line to a point on the west line of said Vineyard Plat; thence continuing west

Exhibit "A"—(Continued)

along the westerly extension of said center line, a distance of 264 feet; thence north to a point which lies 675 feet south of the north line of the northeast quarter of the southeast quarter of Section 35; thence west 594 feet to a point on the east line of the plat known as Lumber Addition (according to the plat thereof recorded in Volume 3, page 52, Plat Records); thence south along said east line to a point on the northerly line of the right-of-way of the Oregon-Washington Railroad and Navigation Company, (U.P.R.R. Co.); thence northwesterly along said northerly line to the southwest corner of said Giards' Orchard; thence north along the west line of said Giards' Orchard to the point of beginning.

The segment of land above described contains 164.94 acres, more or less. [43]

Segment Q

That portion of Sections 27, 28, 29, 30, 33, 34 and 35, all in Township 9 North, Range 29 East of the Willamette Meridian, Benton County, Washington, described as follows:

Beginning at a point where the west line of the east half of Government Lot 2 of said Section 30 intersects the right bank of the Columbia River; thence easterly along said right bank to a point of intersection with the east line of Government Lot 3 of said Section 35; thence south along said east line to a point on the south line of the right-of-way of State Highway No. 3 (U.S. No. 410);

Exhibit "A"—(Continued)

thence westerly along said south line to the northwest corner of Giards' Orchard (according to the plat thereof recorded in Volume 3, page 23, Plat Records); thence south along the west line of said Giards' Orchard to a point on the northerly line of the right-of-way of the Oregon-Washington Railroad and Navigation Company (U.P.R.R. Co.); thence westerly along said northerly line to a point of intersection with the northerly line of the right-of-way of the Columbia Irrigation District's Main Canal; thence continuing westerly along the last mentioned northerly line to a point on the west line of the southeast quarter of said Section 29; thence north along said west line to a point which lies south 660 feet, more or less, from the center of said Section 29; thence west 330 feet; thence north 330 feet; thence west 330 feet; thence north 330 feet, more or less, to a point on the south line of Government Lot 4, which line is also the south line of Wadler's Center (according to the plat thereof recorded in Volume 3, page 100, Plat Records); thence west along the south line of said Wadler's Center to the southwest corner thereof; thence north along the west line of said Wadler's Center, to a point lying south, a distance of 457 feet, from the south line of the right-of-way of said State Highway No. 3; thence west, at right angles to the said west line of Wadler's Center, a distance of 275 feet, to a point on a line lying parallel with the said west line of Wadler's Center; thence north along said parallel line, to a point on the

Exhibit "A"—(Continued)

south line of the right-of-way of said State Highway No. 3; thence west along the said south right-of-way line to a point on the east line of the west 328 feet of Government Lot 5 in said Section 29; thence north along the said east line to a point on the north line of the said right-of-way of State Highway No. 3; thence west along the said north right-of-way line, to a point on the west line of the said east half of Government Lot 2 in said Section 30; thence north along the said west line to the point of beginning.

The segment of land above described contains 399.97 acres, more or less. [44]

Segment R

That portion of Section 25, Township 9 North, Range 28 East of the Willamette Meridian, and Section 30, Township 9 North, Range 29 East of the Willamette Meridian, all in Benton County, Washington, described as follows:

Beginning at a point where the east line of the west half of Government Lot 2 of said Section 30 intersects the northerly line of the right-of-way of State Highway No. 3 (U.S. No. 410); thence west along said northerly line to a point on the southerly extension of the east line of Lot 9 in Block 2 of Riverfront Plat (according to the plat thereof recorded in Volume 3, page 76, Plat Records) in said Section 30; thence north along the said southerly extension and the east line of said Lot 9, to a point on the south line of the north 50 feet of said Lot 9;

Exhibit "A"—(Continued)

thence west along the said south line, to the west line of said Lot 9 and the east line of Lot 8 in said Block 2; thence north along the said east line of Lot 8, a distance of 10 feet, to a point on the south line of the north 40 feet of said Lot 8; thence west along the said south line to the west line of said Lot 8 and the east line of Lot 7 in said Block 2; thence north along the said east line of Lot 7, a distance of 10 feet, to a point on the south line of the north 30 feet of said Lot 7; thence west, along the said south line to the west line of said Lot 7 and the east line of Lot 6 in said Block 2; thence north along the said east line of Lot 6, a distance of 10 feet, to a point on the south line of the North 20 feet of said Lot 6; thence west along the said south line to the west line of said Lot 6 and the east line of Lot 5 in said Block 2; thence north along the said east line of Lot 5, a distance of 10 feet, to a point on the south line of the north 10 feet of said Lot 5; thence west along said south line to the west line of said Lot 5; thence north along the said west line, a distance of 10 feet, to the northwest corner of said Lot 5, which lies on the south line of Rose Avenue in said Riverfront Plat; thence west along the south line of said Rose Avenue, to the northwest corner of Lot 1 in said Block 2; thence continuing west along the westerly extension of the said south line of Rose Avenue, a distance of 70 feet; thence northwesterly to a point on the west line of Government Lot 3 in said Section 30, which point lies north, a distance of 375 feet, from the north-

Exhibit "A"—(Continued)

erly line of the said right-of-way of State Highway No. 3, measured along said west line; thence continuing northwesterly to a point on the west line of the east 9.29 acres of Government Lot 4 in said Section 30, which point lies north, a distance of 760 feet, from the northerly line of said highway right-of-way; thence westerly to the southeast corner of Lot 2 in Block 2 of Laird's Plat (according to the plat thereof recorded in Volume 3, page 18, Plat Records) in said Section 30; thence west along the south line of said Lot 2 in Block 2, and the westerly extension thereof to a point on the center line of Laird Road in said Laird's Plat; thence south along said center line, a distance of 25 feet, to a point on the easterly extension of the south line of the north 25 feet of Lot 3 in Block 1 of said Laird's Plat; thence west along said easterly extension and the south line of the said north 25 feet, to the west line of said Laird's Plat; thence north along said west line, to a point of [45] intersection with the southerly line of the right-of-way of Levee No. 4 A as shown on the Corps of Engineers, U. S. Army, Construction Drawing No. MDL-1-0-4/2B; thence westerly along said southerly right-of-way line to a point on the east line of Section 25 in said Township and Range; thence south along said east line to a point on the northerly line of the right-of-way of the Richland-Kennebec Highway; thence northwesterly along said right-of-way line, a distance of 701.9 feet, to the westerly side of the concrete culvert under the roadway; thence northeasterly, at an

Exhibit "A"—(Continued)

angle of $90^{\circ} 23'$ to the right, a distance of 249.7 feet; thence southeasterly, at an angle of $86^{\circ} 15'$ to the right, a distance of 415 feet, more or less, to a point on the east line of said Section 25; thence north along the said east line to a point on the southerly bank of the Yakima River; thence easterly along said southerly bank to a point on the east line of the west half of said Government Lot 2 in Section 30; thence south along the said east line to a point on the northerly line of right-of-way of said State Highway No. 3 and the point of beginning.

The segment of land above described contains 29.45 acres, more or less.

Segment S

That portion of Sections 23, 24, 25, Township 9 North, Range 28 East of the Willamette Meridian, Benton County, Washington, described as follows:

Beginning at a point where the northerly line of the right-of-way of the Columbia Irrigation District's Main Canal intersects the west line of said Section 23; thence north along the said west line to a point on the right (southerly) bank of the Yakima River; thence southeasterly, northeasterly and southeasterly along the right bank of the Yakima River, to a point on the east line of Section 25; thence south along the said east line of Section 25, to a point lying north, a distance of 350 feet, from the northerly line of the right-of-way of the Richland-Kennewick Highway; thence northwesterly

Exhibit "A"—(Continued)

along a bearing of approximately North $29^{\circ} 20'$ West, a distance of 415 feet, to a point on a line which subtends an angle of $90^{\circ} 23'$ (left) from the northeasterly line of the said right-of-way of the Richland-Kennewick Highway and which point lies northeasterly a distance of 249.7 feet, from said right-of-way line; thence southwesterly along said subtended line, a distance of 249.7 feet, to said right-of-way line; thence southeasterly along said right-of-way line, to a point on a line lying at right angles to and extending northeasterly from the southwesterly line of said right-of-way of the Richland-Kennewick Highway at the point of intersection with the westerly line of the connecting road between the said Richland-Kennewick Highway and State Highway No. 3 (U.S. No. 410); thence southwesterly along said extended line to the said point of intersection with the said westerly line of the connection road; thence south along said westerly line, to a point lying north, 208.71 feet, from northerly line of the right-of-way of said State Highway No. 3; thence North $71^{\circ} 17'$ West, 208.71 feet; thence South $18^{\circ} 43'$ West, 208.71 feet, to a point on the northerly line of the said right-of-way of State Highway No. 3; thence westerly along said northerly right-of-way line to a point lying opposite and 50 feet distant from Highway Engineer's Station 25+70, measured at right angles thereto, thence southwesterly at a right angle to the left, [46] to a point lying on the southerly line of said right-of-way, being opposite and 50 feet dis-

Exhibit "A"—(Continued)

tant from said Highway Engineer's Station 25+70; thence South $18^{\circ} 45'$ West, 25 feet; thence southwesterly, a distance of 583 feet, more or less, to a point on a line bearing North $8^{\circ} 28'$ East from a point lying on the northerly line of the right-of-way of the said Columbia Irrigation District's Main Canal; thence South $8^{\circ} 28'$ West along said line, a distance of 36.7 feet, to said point on the northerly line of the Main Canal right-of-way; thence northwesterly along the said northerly line to a point on the east line of the west 300 feet of the northeast quarter of the northwest quarter of said Section 25; thence south along said east line to a point on the south line of the said northeast quarter of the northwest quarter; thence west along the said south line a distance of 300 feet to the southwest corner thereof; thence continuing west along the south line of the northwest quarter of the northwest quarter of said Section 25, a distance of 330 feet; thence north, parallel with the east line of the said northwest quarter of the northwest quarter, to a point on the northerly line of the right-of-way of the said Columbia Irrigation District's Main Canal; thence northwesterly along said northerly line, to a point of intersection with the west line of said Section 23 and the point of beginning.

There is excepted therefrom all that portion lying within the right-of-way of the Columbia Irrigation District's Main Canal.

The segment of land above described contains 431.15 acres, more or less.

Exhibit "A"—(Continued)

Segment "T"

That portion of Sections 15, 16 and 22, Township 9 North, Range 28 East of the Willamette Meridian, Benton County, Washington, described as follows:

Beginning at a point on the north line of said Section 16, which point lies on the northeasterly line of right-of-way of the Main Canal of the Columbia Irrigation District; thence southeasterly along the said canal right-of-way line to a point on the south line of said Section 15; thence east along the said south line of Section 15 to a point lying east a distance of 200 feet, from the quarter section corner lying on said south line of Section 15; thence South $44^{\circ} 30'$ East, 480 feet; thence South $67^{\circ} 40'$ East, 600 feet; thence South $74^{\circ} 53'$ East, 450 feet; and thence South $43^{\circ} 42'$ East, a distance of 870 feet, more or less, to a point on the north line of Government Lot 4 of said Section 22; thence west along the said north line of Lot 4 to a point on the northerly line of right-of-way of the said Main Canal; thence southeasterly along the said canal right-of-way line, to a point on the east line of said Government Lot 4; thence north along the said east line to a point on the line of ordinary high water on the right (southerly) bank of the Yakima River; thence northwesterly along the said line of ordinary high water, to a point on the north line of said Section 16; thence west along said section line to the point of beginning.

The segment of land above described contains 153.00 acres, more or less. [47]

Exhibit "A"—(Continued)

PARCEL III.

Tract K-538E

A tract of land lying in Government Lot 1, Section 14, Township 8 North, Range 30 East of the Willamette Meridian, Benton County, Washington, said tract being all that portion lying within the right-of-way of the spillway of the Columbia Irrigation District, and being more particularly described as follows:

Commencing at the northwest corner of said Section 14, thence east along the north line of said Section 14, a distance of 227 feet, more or less, to a point on the east line of the right-of-way of the canal of the Columbia Irrigation District; thence southwesterly along said east right-of-way line, a distance of 589.8 feet, to the true point of beginning; thence deflect an angle of $91^{\circ} 00'$ to the left, a distance of 380 feet, more or less, to a point on the ordinary high water line on the right (westerly) bank of the Columbia River; thence southeasterly along said line of ordinary high water to a point on the northwesterly line of Lot 2 of Replat of Donelson's Plat (according to the plat thereof recorded in Volume 4, Page 19, Plat Records) in said Section 14, thence southwesterly along said northwesterly line to a point on the easterly line of the right-of-way of the said Columbia Irrigation District Canal; thence northwesterly along said right-of-way line to the point of beginning.

Exhibit "A"—(Continued)

The tract of land above described contains 0.48 of an acre, more or less.

Subject to the right, title, and interest of the public in roads.

Tract K-666E

All that portion of a strip of land which lies within the right-of-way of the existing canal of the Columbia Irrigation District as constructed over and across the northwest quarter of the southwest quarter of Section 14, Township 8 North, Range 30 East of the Willamette Meridian, Benton County, Washington, said strip of land being 110 feet in width, being 30 feet wide on the northerly side and 80 feet wide on the southerly side of a center line which bears South $71^{\circ} 18'$ East from a point lying South $37^{\circ} 22' 01''$ East, a distance of 1042.75 feet, from the northwest corner of said subdivision, said center line extending over and across said canal right-of-way, and intersecting the center line of said right-of-way at a point lying north, a distance of 280 feet, more or less, from the south line of said subdivision.

The tract of land above described contains 0.1 of an acre, more or less. [48]

[Endorsed]: Filed Dec. 2, 1954.

[Title of District Court and Cause.]

RECORD OF PROCEEDINGS
AT THE TRIAL

Be It Remembered:

That the above-entitled action came regularly on for trial and determination on February 17, 1958, before the Honorable Sam M. Driver, Judge, without a jury, in the District Court of the United States for the Eastern District of Washington, Southern Division, it being stipulated to hear the case at Spokane, Washington, the plaintiff appearing by Ronald R. Hull, Assistant United States District Attorney; the defendant, Columbia Irrigation District, appearing by James Leavy; the defendant State of Washington appearing by E. P. Donnelly; and both sides having announced they were ready for trial;

Whereupon, the following proceedings were had, to wit: [51]

Spokane, Washington, Monday, February 17, 1958, 10:00 o'clock a.m.

(Whereupon, the trial in the instant cause was commenced, all parties being present, and the following proceedings were had, to wit:)

(Whereupon, an off the record conference was held in chambers.)

(Whereupon, the proceedings were resumed in open court.)

The Court: The United States against the Columbia Irrigation District.

Mr. Hull: We are ready, your Honor.

Mr. Leavy: Ready, your Honor.

The Court: All right, proceed.

Mr. Hull: If it please the Court, I believe that the pertinent time——

The Court: (Interposing) Pardon me, the Clerk just called my attention to the fact that this is a Southern Division case and I think that we should have for the record here a stipulation of counsel that it may be tried here in Spokane in the Northern Division of the District, is it so stipulated?

Mr. Leavy: It is so stipulated, also, without a jury. [52]

The Court: Yes, all right, without a jury, too.

Proceedings As To Parcel II.

Mr. Hull: I believe that the pertinent date of valuation in this case, No. 765, would be May 13, 1953.

The Court: What is that date, again?

Mr. Hull: May 13, 1953.

The Court: All right.

Mr. Hull: Which was the date of the order granting the right of possession. No, I misread it, it is March 18, 1953.

The Court: All right.

Mr. Hull: That is the date of the order of possession.

Mr. Donnelly: March?

Mr. Hull: March 18, 1953.

Mr. Leavy: I think, technically, it should be March 31, that is the effective date of the order in

which possession was authorized to be taken, on March 31, 1953.

Mr. Hull: All right, it is so corrected.

The Court: All right, March 31.

Mr. Hull: We will address ourselves at this time separately and, first, to Parcel II in Civil No. 765, which has reference to properties which were privately owned by individuals other than the defendant Columbia Irrigation District.

The Court: All right. [53]

Mr. Hull: Yes.

The Court: Let's see, you filed a petition, initially, here, a petition for condemnation?

Mr. Hull: That is correct, your Honor, it was not a declaration of taking at that time.

The Court: There was no declaration filed originally, and in that petition this property you speak of, or the property rights, are designated as Parcel II, is that correct?

Mr. Hull: That is correct.

The Court: All right.

Mr. Hull: There were a number of so-called segments designated in the complaint and I am ready to put a witness, Mr. Max Kizer, on the stand who would testify that none of the property so described was owned by the Columbia Irrigation District, but that those were lands which were included within the District and had been the subject of assessment thereby.

The Court: As I understand it from our informal conference in chambers, counsel for the land owners is willing to stipulate that the District did

not directly own the lands, that they were owned by, or that they were included in the boundaries of the District, but not directly owned by the District, isn't that correct?

Mr. Leavy: Yes, they were within the bounds of the District. The fee titles in all private lands were owned by **individuals within the District**

The Court: Yes.

Mr. Hull: I can make that in an informal offer of proof.

The Court: Well, you could stipulate that, I think that would be sufficient. Are you prepared to make an offer of proof on that phase of the case?

Mr. Leavy: Yes, I am, your Honor. It is my understanding that the Court's ruling is that the District has no compensable interest resulting from the taking of any land in Parcel II?

The Court: Yes, that is the conclusion I have reached here. However, I will reserve the right to change my mind about that before this trial is concluded after reading the case that Mr. Donnelly has called to my attention. I haven't had an opportunity to read it yet, and I will make this tentative ruling and, then, of course, I can always change it before the trial is over if the case he has cited convinces me that I am wrong.

Mr. Leavy: The Columbia Irrigation District offers to prove that in 1947 and 1948 the District was advised that an extensive portion of the lands in the District, subject to assessments, would be taken by the Federal Government in connection with the McNary Dam Project and negotiations

were commenced between representatives of the United States and [55] the Columbia Irrigation District to ascertain the damages payable by the United States to the District; that pursuant to agreement of the parties, it was agreed that the United States would make an appraisal and that the Columbia Irrigation District would fully cooperate with the representatives of the United States in making all necessary information available to the United States' representatives; that representatives of the United States were advised that the District, as a municipal corporation and a public body, would not expend the public funds to make their own appraisal but would probably rely upon the appraisal made by the United States; that thereafter such an appraisal was made by representatives of the United States and prior to May 28, 1951, the Columbia Irrigation District was orally advised on several occasions that within the "near future" a proposal would be made by the United States to the Irrigation District; that on May 28, 1951, the District wrote to a representative of the United States in the Walla Walla District of the Army Engineers pointing out that on numerous occasions the District had been advised that "within the very near future" a proposal would be made and that the Directors of the District were wondering if it could not be done within the next few weeks; that under date of June 7, 1951, Merle E. Lietzke, Chief, Real Estate Division of the United States Army Engineers, wrote to the District advising them that the matter was [56] receiving consideration in the

office of the Chief of Engineers in Washington, D. C., and that a decision was expected within a few days; that shortly thereafter and prior to July 12, 1951, representatives of the United States orally offered to pay to the Columbia Irrigation District for all of their interests the sum of \$149,000.00; that said offer was accepted by the Columbia Irrigation District; that the State of Washington had an interest in this proceeding by reason of holding bonds against the lands in the District, and that the District agreed that the bonded indebtedness would be paid in full by the District upon receiving settlement from the United States; that the amount to retire said bonds as of the time of that agreement, that is, approximately July 1, 1951, was \$145,617.72; that prior to November 10, 1951, the United States prepared and transmitted to Columbia Irrigation District a proposed form of agreement; that the agreement was put into final form prior to December 10, 1951, and was put into final form by representatives of the United States; that on December 10, 1951, the Directors of the Columbia Irrigation District passed a resolution authorizing the execution of the agreement previously sent to them by the United States; that on December 13, 1951, the United States was advised of the execution of the agreement providing for the payment to the Columbia Irrigation District by the United States of \$149,000.00; that said resolution of December 10, 1951, [57] provides, in part, as follows:

“Whereas, the acquisition of all said rights can

most expeditiously and economically be acquired through condemnation proceedings instituted by the United States of America and the United States of America acting by and through the Corps of Engineers, Walla Walla District, Walla Walla, Washington, and the Columbia Irrigation District acting by and through its Board of Directors have agreed that the reasonable value of the interests of the District being acquired by the Government is \$149,000.00, and

Whereas, the lands within the boundaries of the Columbia Irrigation District are subject to a bonded indebtedness in an amount less than said sum and it is desired to pay off said bonds in full from said sum, and

Whereas, to consummate the objectives an agreement has been prepared for execution by the District and the Government, Now Therefore,

Be It Hereby Resolved, at a regular meeting of the Board of Directors of the Columbia Irrigation District, at which meeting all of the Directors of said District were present in person, that that certain agreement, a copy of which is attached hereto and by this reference incorporated herein as fully as if set forth herein verbatim, between the United States of America and the Columbia Irrigation District be executed by the Directors of the Columbia Irrigation District and that the right, title, and estate of the District in and to all of the lands and rights described in said agreement and all of the rights described in said agreement, be sold to the United States of America for the sum of \$149,-

000.00, subject, however, to the continued use by the District of the spillway for surplus waters situated on Tract J-473, McNary Lock and Dam Project, Tract K-538L, McNary Lock and Dam Project, and over and across Sections Twenty-eight (28), and Twenty-nine (29), Township Nine (9), North, Range [58] Twenty-nine (29), EWM, all in Benton County, Washington, and the right in perpetuity to spill waters over said spillways, and

Be It Hereby Further Resolved that the Board of Directors of the Columbia Irrigation District do hereby find that the reasonable market value of all of the rights and interests hereinabove referred to is the sum of \$149,000.00, and

Be It Hereby Further Resolved that James Leavy, as attorney for the Columbia Irrigation District, is hereby authorized, directed, and empowered to fully represent the Columbia Irrigation District in any condemnation proceeding hereafter filed by the United States of America for the acquisition of said interests as hereinabove set forth, and is hereby authorized and directed to enter into such stipulations and agreements as he may consider appropriate and proper to carry out the meaning and intent of this agreement to the end that said interests shall be transferred to the United States of America for the sum of \$149,000.00, and that from said sum there shall be paid to the holders of the bonds the amount due to such holders in full payment of all the outstanding bonded indebtedness of the said Columbia Irrigation District, and

Be It Further Resolved that the Columbia Irri-

gation District grant to the United States of America the right to immediate use and occupancy of the lands hereinabove referred to.

Passed unanimously this 10th day of December, 1951."

That the agreement referred to in said resolution is and was the agreement prepared by the United States of America providing for the payment by the United States to the Columbia Irrigation District of \$149,000.00; that said agreement so prepared by the representatives of the plaintiff was prepared [59] for the signature of the Directors of the Columbia Irrigation District and for the signature of Merle E. Lietzke, Contracting Officer, Chief, Real Estate Division, Corps of Engineers, Walla Walla District; under date of April 16, 1952, the District wrote to the United States pointing out that interest is running on the bonded indebtedness and that the agreement was reached "on the theory that the payment of the funds would be paid relatively promptly * * *"; that under date of April 24, 1952, the United States advised the District, "it is anticipated that the declaration of taking will be forwarded to the Field Representative of the Lands Division for the Department of Justice, within the near future, at which time we shall inform you relative to the date the instrument is filed and the funds deposited in the registry of the United States District Court for the Eastern District of Washington, Southern Division."

That on or about September 12, 1952, at approxi-

mately nine months after the reaching of the agreement between the United States of America and defendant, Columbia Irrigation District, the District was unofficially advised that the United States of America did not intend to carry out their agreement and in lieu thereof intended to file the above-entitled proceeding without making any deposit or agreement or agreeing to pay anything to the defendant, Columbia Irrigation District. [60]

That in reliance upon the integrity of the United States and the agreement of the plaintiff hereinbefore referred to Columbia Irrigation District voluntarily, and at the request of the United States, executed many agreements for rights of entry and other agreements to expedite the McNary Dam and Lock Project, which agreements would not have been executed except for the reliance of the Columbia Irrigation District upon the agreement reached with the United States of America.

That the State of Washington claims a lien upon the lands involved in the above-entitled proceeding and a lien upon any funds or monies paid therefor.

That the Columbia Irrigation District is a municipal corporation of the State of Washington lawfully organized at all times material hereto operating under the laws of the State of Washington; the Columbia irrigation system consists of a gravity flow system designed to serve a relatively narrow strip of irrigable land between the Columbia River and the Horse Heaven Hills. The area is somewhat unique in irrigation districts in that it cannot be expanded since it is surrounded by the Columbia

River, the Yakima River and the Kennewick Highlands Irrigation Project.

The Court: Mr. Leavy, just before you leave the contract, to clarify your offer of proof, it is my understanding that you do not contend that the written contract which, as you say, was prepared by representatives of the United States [61] was ever signed by the United States or by representatives of the United States?

Mr. Leavy: That is correct, your Honor, I might state in that connection that we didn't previously so contend because for a period of four years I requested the Government officers to either tell me that it had been signed or that it had not been signed or to show me a copy of it, and for a period of four years they refused to allow me to ascertain whether or not it was signed. Approximately, a year ago Mr. Hull, the Assistant United States Attorney, showed me the original contract which was unsigned.

The Court: There is an original signed or executed by the District?

Mr. Leavy: It's executed by the District, yes, your Honor.

The Court: I wonder if it wouldn't make a better record, perhaps, to put that in here.

Mr. Leavy: Yes, if the Government would produce it, I would like it.

The Court: Do you have that, Mr. Hull?

Mr. Hull: We have it here. Our position, of course, is that it was never approved or accepted by the Government, that it is a nullity.

The Court: My thought was this, without making any decision as to the effect of it, of course, I have in mind, [62] my present inclination is to reject the offer of proof. I think it would make a better record to show just exactly what was done in connection with the written contract. It would show, on its face, I presume that it was signed by representatives of the District and not by anyone else representing the United States?

Mr. Leavy: For the record, then, we will move that the Government produce it at this time.

The Court: You can tell your superiors that I ordered it done and place the responsibility on me.

Mr. Hull: Now, I have both the original and photostatic copies of the document.

Mr. Leavy: I imagine, the original, since the Government says it's a nullity, it wouldn't hurt them to lose it, now.

The Court: If you have a photostatic copy, I suppose we can consider it. I don't suppose that there is any question about the authenticity of the signatures, but we may as well put the original in. Wasn't a copy of that submitted somewhere along the line in connection with a motion for summary judgment? I seem to remember seeing it.

Mr. Hull: They were produced in court in September, 1956. This is the original of the agreement referred to by counsel. The resolution we do not have the original of. For the record, may it show that we are producing this on [63] direction of the Court?

The Court: Of course, whatever offer you make

here would be assumed to be true, in fact, if the offer is rejected, but I just thought that it would make a more definite and clear record if the document, itself, were put in.

Mr. Leavy: We offer the document labeled "Agreement" so-called, by the Directors of the Columbia Irrigation District and the Secretary, and dated September 10, 1951, together with our offer of proof.

Clerk of the Court: I will mark it as Defendants' 1, your Honor.

The Court: All right, Defendants' Exhibit 1 is identified here, that will identify it. All right, go ahead, then.

(Whereupon, said agreement was marked for identification as Defendants' Exhibit No. 1.)

Clerk of the Court: Is it admitted?

The Court: No, it is offered in connection with the offer of proof. Go ahead, Mr. Leavy.

Mr. Leavy: As I mentioned, the Columbia Irrigation District is in an unusual situation in that, contrary to ordinary districts, it cannot bring additional land to be served, it being circumscribed on all sides by natural barriers. The system is a gravity flow system. The main canal flows approximately twenty-one miles from the Dam to a diversion structure. The average grade of the [64] canal is 1.67 feet per mile. The canal has a capacity of 315 cubic feet per second at the headgate and at its lower end its capacity is 174 cubic feet per second. The canal is of earth construction, in the main, with some areas being concrete-lined and

other areas being clay-lined. There are also some flumes and considerable rock rip-rap to protect the canal. There are three waste-ways on the main canal.

Lateral Number Two takes off from the main canal and runs southeasterly for approximately seven and three-quarters miles. As in the case of the main canal, it is basically earth construction with some concrete-lined canal, some wood-stave flumes and wood-stave pipes and three concrete siphons. This lateral has two concrete waste-ways and several concrete canal checks. The lateral has a capacity of 70.2 cubic feet per second at the upper end and one cubic foot per second at the lower end. It has a grade of 2.58 feet per mile.

Lateral Number One is similar, having a length of 3.8 miles with a capacity at intake of 19.3 cubic feet per second and a capacity at the end of the canal of three cubic feet per second. It has an average grade of 4.2 feet per mile.

Lateral Number Three is similar, and is approximately twelve miles in length. It has a capacity of 82.5 cubic feet per second at the headgate and a lower end capacity of five cubic feet per second. It has a grade of 1.66 feet per mile. [65] There are fourteen local improvement districts in the District and four community laterals.

The soils in the District in lands subject to the irrigation are generally light and sandy and require a large amount of water. With modern farming practices, their productivity has been at a fairly constant level for the past ten years or more.

The described facilities of the District are adequate to serve all the land in the District, including the lands which have been taken by the United States of America in connection with the McNary Project and which are described in this proceeding as Parcels I and II. The District is required by law to render service to all irrigable land in the District, including that land taken by the United States. The lands taken by the United States from private owners are still in the boundaries of the irrigation district. Some of the land taken by the United States is actually now susceptible of irrigation and if the United States should dispose of such land to others the Columbia Irrigation District would be required by law to provide canals and other facilities to serve it. The area taken now that the Project is completed appears to be, in the opinion of witnesses that the District could produce, excessive to the needs of the United States, leaving the potentiality that the Government will dispose of such excess land and it will then be necessary for the District to serve that land. [66]

Prior to the taking by the Government the total acreage in the District was, approximately, 11,086 acres and the irrigated acreage in the District was, approximately, 8,000 acres. The acreage taken in the proceeding as described in Parcels I, II and III amounts to 3,425.13 acres, and the productive acreage that is included in that acreage is, approximately, 1,550 acres. The taking of this productive acreage out of the District will reduce the income of the District for the reason that the District

cannot assess Government-owned land by approximately \$13,000.00 a year. The reduction in acreage will not produce a corresponding reduction in expenses since canal maintenance is not affected except as to small portions of the canal laterals which are taken, or which have been taken. Approximately 132 of the total acres taken, as above-mentioned, are acres of land owned in fee by the Columbia Irrigation District and several thousand dollars worth of irrigation facilities were taken, most of which are included in the lands described as Parcel I. The sole source of income that the District has from which it is to pay its operation and maintenance expense and bonds and any additional construction costs is assessment against land, except for a very small source of income from the sale or rental of land owned by the District. The latter source of income is trivial in amount. The lands embraced in the District are virtually useless without the application of [67] irrigation water as furnished by the facilities of the Columbia Irrigation District due to the arid nature of the land. The Columbia Irrigation District has an assured water right duly filed and recorded for the appropriation of 300 cubic feet per second of water from the Yakima River and has facilities by way of gravity flow canal for the transmission of said water supply from the point of diversion to the lands in the Irrigation District; that all lands in the District benefit directly and indirectly from the existence of the District by reason of the fact that the application of water to this arid land

makes the land productive and valuable and provides economic support and income for the surrounding area, including the lands in and outside of the Irrigation District; that the size of the transmission facilities of the Columbia Irrigation District is and are and presently are originally based upon the economic feasibility of supplying water to the lands in the District as it existed prior to the acquisition of lands within the District by the plaintiff and that said facilities are excessive in size for the service of the lands remaining in the District after the acquisition of the lands by the Government. The lands acquired by the Government for the McNary Lock and Dam Project had water rights appurtenant thereto and each tract in such land received benefits from being included within the District and the District was ready at all times to supply service by way of irrigation water to said lands and [68] still is.

The Columbia Irrigation District, even if it becomes insolvent, cannot be dissolved if the State of Washington, as the principal bondholder, objects thereto; under the laws of the State of Washington assessments made by the Columbia Irrigation District shall be made in proportion to the benefits accruing to the lands assessed; that the laws of the State of Washington provide that any public lands of the State of Washington situated in any irrigation District shall be subject to the laws relating to the collection of irrigation district assessments to the same extent and in the same manner in which lands of like character held under

private ownership are subject thereto; that the right to assess lands for the operation and maintenance of an irrigation district under the laws of the State of Washington is a paramount obligation upon all lands included in such district; that the lands acquired by the plaintiff in this proceeding, as above alleged, cannot be assessed due to the principle that the Federal Government cannot be taxed by the State.

The law of the State of Washington makes all lands of the District liable for assessment to pay costs of construction and operation and maintenance, and there is no provision for the release of any portion of the land in the District from this liability. All values of all land taken by the United States and described in this proceeding as [69] Parcels I, II and III were fixed free of future encumbrances as the United States does not pay assessments. Oh, I might add insofar as the lands described as Parcel II are concerned the Irrigation District and the State of Washington did not receive any notice of the acquisition of said lands other than the notice given by this proceeding, which proceeding assumes that the Government has already acquired all of the lands in Parcel II from others.

The taking of the land by the Federal Government within the District, including both land taken from private owners and now removed from susceptibility to assessment, and the land taken from the District, including rights-of-way and improvements, changes the Columbia Irrigation District

from an economically feasible operating Irrigation District to an uneconomic Irrigation District. This results, basically, from the capital investment being disproportionate to the potential revenue. A willing buyer would have paid \$250,000.00 more for the system before the removal of Parcels I, II and III than he would now. This loss of market value in the system results from the fact that investors in irrigation systems reasonably amortize the investment at four percent over a forty to fifty year period. This is the standard practice in the Northwest. The potential revenue from the area as it existed before the taking considered by a willing buyer who was not forced to buy together with the condition of the [70] facilities was such that the reasonable market value of the system prior to the taking was \$700,000.00. The value after the loss of Parcels I, II and III was \$450,000.00. The just compensation that should be paid to the Columbia Irrigation District is \$250,000.00.

The District offers to prove all of the foregoing facts by competent witnesses.

The Court: I suppose it is covered by your offer, Mr. Leavy, but I wonder if there is any dispute about that, is it agreed that the Government has applied for public use all of the lands embraced within Parcel II in your petition?

Mr. Hull: I am sorry?

The Court: Well, I said I think it is covered by Mr. Leavy's offer of proof but I don't think there should be any question about it, I understand that it is a fact that the Government has acquired

for public use from the private owners all of the lands in Parcel II?

Mr. Hull: That is correct.

The Court: The record may show that. Do you have any comment upon this offer of proof, Mr. Hull, before I pass and rule upon it?

Mr. Hull: I can and would traverse it for the record but I see no objection, it simply being an offer of proof.

The Court: You are objecting to it?

Mr. Hull: Yes. [71]

The Court: At this time I will sustain the objection to the offer of proof. I might say at this time the issue presented by the offer was involved in a motion for summary judgment by the plaintiff United States and that the matter was argued and a comprehensive brief submitted and the Court gave it very careful consideration and that is the reason that I feel that I am in a position now to rule summarily on the offer. I did spend quite a lot of time and thought on this problem because I think, as I have indicated here, the record of the prior hearing would show I have been aware of the equities, which I think favor the landowner District here. It didn't seem to me that there was any question but what the District had suffered very great financial loss because of the taking of these lands and the cutting down of the amount of land which they served and, of course, any plant, an irrigation plant, if it is not able to operate at full capacity, operates at an economic loss, as a rule, so that I think there has been a loss but

I come reluctantly to the conclusion that it is consequential and one for which compensation cannot be made in a compensation case, and that is the basis of my ruling here. However, I will before I make this final ruling examine that case just during my lunch hour, that case which you have cited, Mr. Donnelly.

Mr. Donnelly: All right.

The Court: Now, as I understand it, the position of [72] the Government is that there is no compensable element in Parcel II for which any compensation can be made. I don't know whether you have in mind awarding nominal damages or simply no damage, I doubt that it makes much difference.

Mr. Hull: There would be no compensative loss as to the District and, therefore, not even a nominal damage.

The Court: I see, and do you think that that is apparent by the offer of proof here, or do you have anything further to offer?

Mr. Hull: Well, I think in the facts that have been by now stipulated that the District owned no portion of said lands in Parcel II and that, at the most, all they had was a right to future assessment which we, of course, contend is not compensable.

The Court: Well, you may prepare findings and judgment on that basis and in order to facilitate appeal and cut the expense of appeal I am going to make separate findings and separate judgment as to Parcel II, separate and apart from I and III,

and then when you are ready, then, you may proceed on the Parcels I and III.

(End of Proceedings as to Parcel II.) [73]

Reporter's Certificate Attached. [74]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW— Parcel II

This cause having come on regularly for trial on February 17, 1958, upon the issues of law and fact arising from the acquisition by the plaintiff of the lands described within Parcel II herein, the plaintiff United States of America being represented by Ronald R. Hull, Assistant United States Attorney, the defendant Columbia Irrigation District, a municipal corporation, being represented by its attorney James Leavy, and the defendant State of Washington being represented by E. P. Donnelly, Assistant Attorney General for the State of Washington; a jury having been waived, and place of trial at Spokane, Washington, having been consented to; and certain material facts having been stipulated into the record by the respective parties, and the Court having heard argument of counsel upon the issues herein, and having ruled upon the offer of further proof by the defendants, and the Court being fully advised in the premises;

And the Court having directed, that the issues of fact and law with regard to Parcel II herein

may be segregated from those of Parcels I and III in this action;

Now, Therefore, the Court hereby makes, with respect to Parcel II in this action, the following

Findings of Fact

I.

On December 23, 1952, the plaintiff United States of America, pursuant to Acts of Congress, instituted this proceeding by the filing of complaint in condemnation to acquire all right, title, and interest of the Columbia Irrigation District, a municipal corporation, defendant herein, in and to the lands hereinafter described, for public uses, for a river improvement for the purposes of navigation, flood control, and other purposes incident thereto, in connection with the construction and operation of the McNary Lock and Dam Project.

II.

On December 2, 1954, plaintiff United States of America filed herein an amended complaint in condemnation, thereby revising and describing the estate to be acquired as: Parcel II, consisting of:

All right, title, and interest of the Columbia Irrigation District in and to the lands in Parcel II, consisting of Segments F, G, H, J, K, L, P, Q, R, S, and T as described in Exhibit "A" attached hereto and made a part hereof.

III.

On March 31, 1953, the plaintiff United States of America acquired possession of the lands and

interests described in Parcel II herein by order of the Court granting right of possession in the plaintiff, entered March 18, 1953.

IV.

At or prior to the date of the commencement of this action, all of the lands described within Parcel II herein were owned by persons or corporations other than these defendants, and fee estates upon all of said lands have been acquired by the United States of America, by condemnation or direct purchase, from their said owners. At the time of commencement of this action and thereafter, defendant [76] Columbia Irrigation District, a municipal corporation, held no title, either legal or equitable, to the lands described as Parcel II herein or any part thereof. All of the lands described within said Parcel II were as of the commencement of this action, included within the boundaries of the defendant Columbia Irrigation District and had, prior to their acquisition by the United States of America, been subject of assessment by said District.

V.

At the time of the commencement of this action and thereafter, the defendant State of Washington held no title, either legal or equitable, in and to the lands described as Parcel II herein, or any portion thereof; the defendant State of Washington was then holder and obligee of irrigation district bonds issued by the Columbia Irrigation District, a muni-

municipal corporation organized and existing under the laws of the State of Washington.

From the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

I.

The Court has jurisdiction of the parties and subject matter herein.

II.

The defendant Columbia Irrigation District, a municipal corporation, held no title or ownership in or to the lands herein designated as Parcel II as of the commencement of this action, and holds no compensable interest therein by reason of the acquisition of said lands by the plaintiff United States of America; that no compensation is due said defendant by reason of said taking.

III.

The defendant State of Washington held no title or ownership in or to the lands herein designated as Parcel II as of the [77] commencement of this action, and holds no compensable interest therein by reason of the acquisition of said lands by the plaintiff United States of America; that no compensation is due said defendant by reason of said taking.

IV.

All right, title and interest of the Columbia Irrigation District in and to the lands in Parcel II

consisting of Segments F, G, H, J, K, L, P, Q, R, S, and T as described in Exhibit "A" attached hereto should be held and confirmed to have vested in the United States of America.

Dated this 1st day of April, 1958.

/s/ SAM M. DRIVER,
Judge of the U. S. District
Court.

Presented By:

/s/ RONALD R. HULL,
Assistant U. S. Attorney. [78]

[Endorsed]: Filed April 1, 1958.

In The District Court of the United States, Eastern
District of Washington, Southern Division

Civil No. 765

UNITED STATES OF AMERICA,

Plaintiff,

vs.

3,479.73 ACRES OF LAND, more or less, in Benton County, Washington; COLUMBIA IRRIGATION DISTRICT, a municipal corporation, et al.,

Defendants.

JUDGMENT— Parcel II

The above cause having come on regularly for trial on February 17, 1958, the plaintiff appearing by its attorney, Ronald R. Hull, Assistant United

States Attorney, the defendant Columbia Irrigation District, a municipal corporation, appearing by its attorney, James Leavy, and the defendant State of Washington being represented by E. P. Donnelly, Assistant Attorney General for the State of Washington, and the Court having made and entered its Findings of Fact and Conclusions of Law herein, and being fully advised in the premises;

And the Court having directed that the issues of fact and law with regard to Parcel II herein may be segregated from those of Parcels I and III in this action;

Now, Therefore, It Is Ordered, Adjudged, and Decreed

1. At the time of the commencement of this action, the defendant Columbia Irrigation District, a municipal corporation, held no title or ownership in or to the lands herein designated as Parcel II, and holds no compensable interest therein by reason of the acquisition of said lands by the plaintiff United States of America; that no compensation is due said defendant by reason of said taking. [94]

2. At the time of the commencement of this action the defendant State of Washington held no title or ownership in or to the lands herein designated as Parcel II, and holds no compensable interest therein by reason of the acquisition of said lands by the plaintiff United States of America;

that no compensation is due said defendant by reason of said taking.

3. All right, title and interest of the Columbia Irrigation District, a municipal corporation, defendant herein, in and to the lands in Parcel II consisting of Segments F, G, H, J, K, L, P, Q, R, S, and T as described in Exhibit "A" attached hereto, are hereby held and confirmed to have vested in the United States of America.

Dated this 1st day of April, 1958.

/s/ SAM M. DRIVER,
Judge of the U. S. District
Court.

Presented By:

/s/ RONALD R. HULL,
Assistant U. S. Attorney. [95]

[Exhibit "A" attached hereto is the same as "Parcel II" set out at pages 19-52 of this printed record.]

[Endorsed]: Filed April 1, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL—(Par. 2)

Notice Is Hereby Given that defendant, Columbia Irrigation District, a municipal corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Findings of Fact and Conclusions of Law and Judgment as to

Parcel II entered in this action on the 1st day of April, 1958.

LEAVY & TABER,

/s/ By JAMES LEAVY,

Attorneys for Appellant, Columbia Irrigation District, a municipal corporation. [111]

[Endorsed]: Filed April 30, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL—(Par. 2)

We, The Undersigned, jointly and severally, acknowledge that we and our personal representatives are bound to pay to United States of America, plaintiff, the sum of \$250.00.

The condition of this bond is that, whereas the defendant, Columbia Irrigation District, a municipal corporation, has appealed to the Court of Appeals for the Ninth Circuit by Notice of Appeal filed the 30th day of April, 1958, from the judgment of this Court entered April 1, 1958, if the defendant, Columbia Irrigation District, shall pay all costs adjudged against it if the appeal is dismissed or the judgment affirmed or such costs as the Appellate Court may award if the judgment is modified, then this bond is to be void, but if the defendant fails to perform this condition, payment of the amount of this bond shall be due forthwith.

[Seal]

COLUMBIA IRRIGATION

DISTRICT,

/s/ By JAMES LEAVY,

Defendant.

[Seal] FIDELITY and DEPOSIT COM-
 PANY, OF MARYLAND,
 /s/ By WENDELL P. BROWN,
 Surety—Attorney-in-Fact. [112]

Signed and acknowledged before me this 22nd
day of April, 1958.

[Seal] /s/ DUANE E. TABER,
Notary Public in and for the State of Washington,
 residing at Pasco. [113]

[Endorsed]: Filed April 30, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendant, State
of Washington, hereby appeals to the United States
Court of Appeals for the Ninth Circuit from the
findings of fact and conclusions of law and judg-
ment as to Parcel II entered in this action on the
1st day of April, 1958.

 /s/ JOHN J. O'CONNELL,
 Attorney General.

 /s/ E. P. DONNELLY,
 Assistant Attorney General,
 Attorneys for Defendant,
 State of Washington. [116]

[Endorsed]: Filed May 13, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals filed in the above cause, called for in Appellant's Designation filed on May 7, 1958, except for item No. 3 therein, entitled, "Appearance of Columbia Irrigation District" which was not filed in this cause.

Date of Filing: 12/23/52. Title of Document:
Complaint for Condemnation.

Date of Filing: 12/2/54. Title of Document:
Amended Complaint for Condemnation; Record of
Proceedings at the trial.

Date of Filing: 4/1/58. Title of Document:
Findings of Fact and Conclusions of Law.

Date of Filing: 4/1/58. Title of Document: Judgment.

Date of Filing: 4/30/58. Title of Document:
Notice of Appeal (Columbia Irr. Dist.).

Date of Filing: 4/30/58. Title of Document:
Bond for costs.

Date of Filing: 5/7/58. Title of Document: Designation of Record with affidavit of service.

Date of Filing: 5/13/58. Title of Document:
Notice of Appeal (State of Washington).

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court at
Yakima in said district this 5th day of June, 1958.

[Seal] /s/ STANLEY D. TAYLOR,
Clerk of said Court.

[Endorsed]: No. 16047. United States Court
of Appeals for the Ninth Circuit. Columbia Irrig-
ation District, a corporation, Appellant, vs.
United States of America, Appellee. State of
Washington, Appellant, vs. United States of
America, Appellee. Transcript of Record. Ap-
peals from the United States District Court for
the Eastern District of Washington, Southern Di-
vision.

Filed: June 6, 1958.

Docketed: June 16, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 16047

COLUMBIA IRRIGATION DISTRICT, a cor-
poration, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATE OF WASHINGTON, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS

The points upon which appellant will rely on appeal are:

I.

That the Court erred in directing in the "Findings of Fact" that the issues of fact and law with regard to Parcel II herein may be segregated from those of Parcels I and III in this action.

II.

That the Court erred in making and entering its "Conclusions of Law" numbered II and IV, reading as follows:

"II. The defendant, Columbia Irrigation District, a municipal corporation, held no title or own-

ership in or to the lands herein designated as Parcel II as of the commencement of this action, and holds no compensable interest therein by reason of the acquisition of said lands by the plaintiff, United States of America; that no compensation is due said defendant by reason of said taking.

“IV. All right, title and interest of the Columbia Irrigation District in and to the lands in Parcel II consisting of Segments F, G, H, J, K, L, P, Q, R, S, and T as described in Exhibit “A”, attached hereto, should be held and confirmed to have vested in the United States of America.”

III.

The Court erred in entering Judgment as to Parcel II in making the following quoted Judgment:

“At the time of the commencement of this action, the defendant, Columbia Irrigation District, a municipal corporation, held no title or ownership in or to the lands herein designated as Parcel II, and holds no compensable interest therein by reason of the acquisition of said lands by the plaintiff, United States of America; that no compensation is due said defendant by reason of said taking.

“All right, title and interest of the Columbia Irrigation District, a municipal corporation, defendant herein, in and to the lands in Parcel II consisting of Segments F, G, H, J, K, L, P, Q, R, S, and T as described in Exhibit “A”, attached

hereto, are hereby held and confirmed to have vested in the United States of America.”

LEAVY & TABER,

/s/ By JAMES LEAVY,

Attorneys for Appellant, Columbia Irrigation District, a municipal corporation.

[Endorsed]: Filed June 20, 1958. Paul P. O'Brien, Clerk.

[Note: The Statement of Points Filed June 27, 1958, by State of Washington, signed by John J. O'Connell, Attorney General, and E. P. Donnelly, Assistant Attorney General, is the same as set out at pages 87-89 of this printed record.]

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 17 (of the Rules of the United States Court of Appeals for the Ninth Circuit) the appellant, Columbia Irrigation District, hereby designates for inclusion in the records on appeal to the United States Court of Appeals for the Ninth Circuit, taken by Notice of Appeal filed April 30, 1958, the following portions of the record, proceedings, and evidence in this action:

1. The Petition for Condemnation without the attached exhibits.

2. The Amended Petition for Condemnation with exhibits.

3. The Record of Proceedings at the Trial.

4. The Findings of Fact and Conclusions of Law without the attached exhibits.

5. The Judgment with attached exhibits.

6. Notice of Appeal.

7. Bond for Costs.

8. Affidavit of Service.

9. Designation of Contents of Record on Appeal.

LEAVY & TABER,

/s/ By JAMES LEAVY,

Attorneys for Appellant, Columbia Irrigation District.

[Endorsed]: Filed June 20, 1958. Paul P. O'Brien, Clerk.

[Note: The Designation of Record on Appeal Filed June 27, 1958, by the State of Washington, signed John J. O'Connell, Attorney General, by E. P. Donnelly, Assistant Attorney General, is the same as set out at pages 89-90 of this printed record.]

No. 16047

United States
Court of Appeals
for the Ninth Circuit

COLUMBIA IRRIGATION DISTRICT, a corporation, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

STATE OF WASHINGTON, Appellant,
vs.

UNITED STATES OF AMERICA, Appellee.

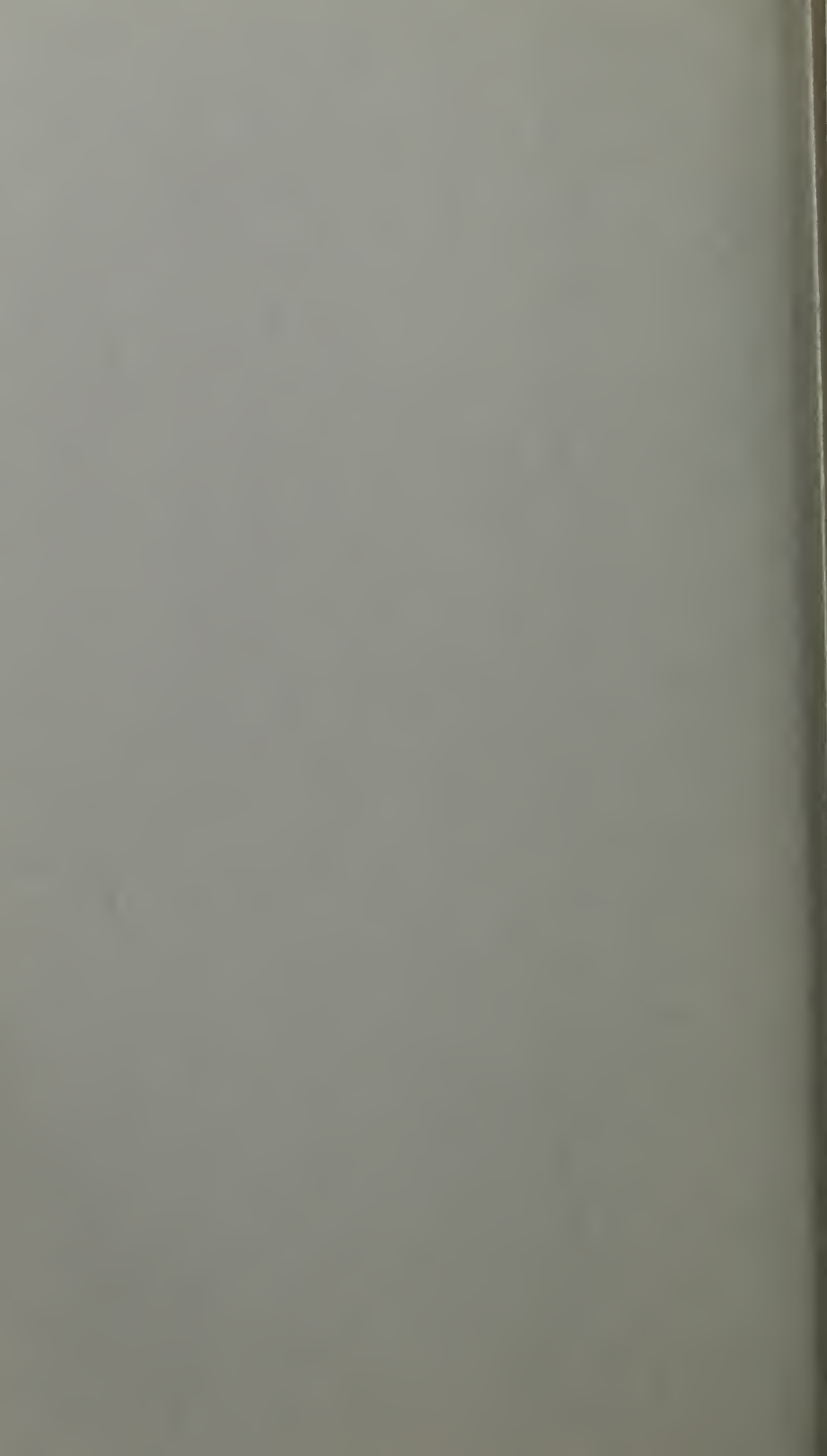
Brief of Appellants

Appeals from the United States District Court
for the Eastern District of Washington,
Southern Division

LEAVY & TABER
117 So. 3rd Ave., Pasco, Wash.
and
THE ATTORNEY GENERAL
and EDWARD P. DONNELLY
Assistant
Attorneys for Appellants

FILED

NOV 12 1958



No. 16047

United States
Court of Appeals
for the Ninth Circuit

COLUMBIA IRRIGATION DISTRICT, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
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STATE OF WASHINGTON,
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Brief of Appellants

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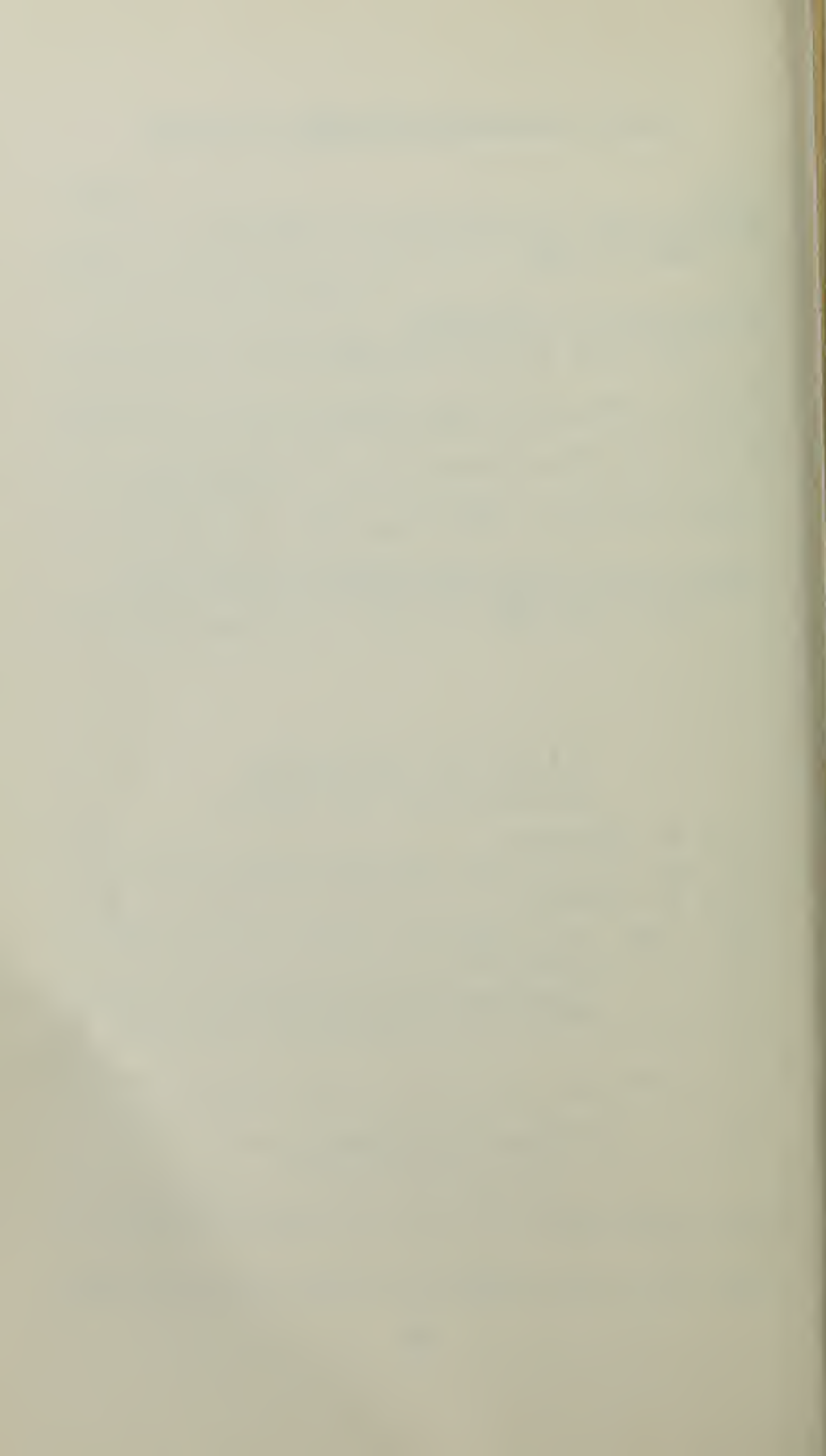
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JURISDICTION

This case is an eminent domain proceeding instituted by the United States in the District Court pursuant to Acts of Congress including 40 U.S.C., Section 257. Appellant invokes the jurisdiction of this Court under 28 U.S.C., Section 1291 as an appeal from a judgment of the U. S. District Court. The Amended Complaint (R.5) and the Judgment (R.80) show the existence of the jurisdictions.

STATEMENT OF THE CASE AND QUESTIONS INVOLVED

The United States instituted this proceeding to acquire by condemnation all interest of the Columbia Irrigation District in the lands described. The lands are described as Parcels I, II and III. Parcel I included fee title ownerships, Parcel III included easements owned and Parcel II included all lands taken by the United States from private owners which were within the boundaries of the Columbia Irrigation District. All of parcels I, II and III were subject to the District's bonds held by the State of Washington. The three parcels were physically contiguous.

The Trial Court directed that Parcels I and III be segregated from Parcel II and entered Judgment that the interests of the defendants in Parcel II, as so segregated, were non-compensable and said interests, by virtue of this proceeding, were vested in the United States. The defendants made an of-

fer of proof which was rejected. The offer comprises pages 58 to 76 of the record. In essence, the proof offered is that the United States, with the full co-operation of the State and the District, made a careful study of the value of the interests to be acquired (including Parcels I, II and III) and, in 1951, offered the District \$149,000.00 for them. The District accepted the offer and as a part thereof, agreed to use the funds to fully retire the bonds held by the State. The United States prepared an agreement to this effect which was signed by the District on December 10, 1951. As prepared by the United States, the agreement was to be signed by the "Contracting Officer, Chief, Real Estate Division, Corps of Engineers, Walla Walla District".

In April of 1952, the United States advised the District, the "funds" would be deposited in the near future in the United States District Court. In lieu of that, this action was filed in 1953, no funds were deposited, and the United States attempted to repudiate its agreement.

The District's geographical location makes it somewhat unique in that it cannot expand to bring in more land. The District's plant is a gravity flow system using approximately forty-four miles of main canals. The taking of the lands in Parcels I, II and III changes the District from an economic facility to an uneconomic one since the facilities (with minor exceptions) and the cost of operating them remains fixed with the revenue vastly reduced. The

revenue loss equals approximately \$13,000.00 a year. The cost of the facilities (and the bonded indebtedness) cannot be eliminated and the revenue lost cannot be replaced. In addition, since all of Parcel II is still in the District, the District is required by law to furnish water to it, if requested. Proof is offered that the area taken is excessive to the needs of the United States, leaving the potentiality that the United States will dispose of the excess to private owners who will request service.

As a result of the taking of the lands in Parcels I, II and III, the market value of the District has been reduced by \$250,000.00.

The Trial Court found that there was no question but that the District has "suffered a very great financial loss because of the taking of these lands . . . and, of course, any plant, an irrigation plant, if it is not able to operate at full capacity, operates at an economic loss, as a rule, so that I think there has been a loss but I come reluctantly to the conclusion that it is consequential . . ." (R.74)

Thus, the question raised by this appeal through the offer of proof, is, is the obvious financial loss of the District a compensable loss? If an interest is taken why is it non-compensable? If no rights or interests are taken, why condemn them and enter a judgment "taking" them?

A secondary question is, is the United States

estopped to deny the agreement to pay the District \$149,000.00?

A tertiary question is, can the United States destroy the present lien of the State as bondholder on the facilities taken without compensation being paid?

SPECIFICATIONS OF ERROR

- (1) The Trial Court erred in segregating the issues of fact and law as to Parcel II from those of Parcels I and III.
- (2) The Trial Court erred in rejecting the Offer of Proof. See Record pp. 55 to 76.
- (3) The Trial Court erred in making and entering its Conclusions of Law and Judgment vesting all right, title and interest of the District in the lands in Parcel II in the United States and concluding that no compensation is due the District.

SUMMARY OF ARGUMENT

Parcels I, II and III should not have been segregated as they comprise a contiguous unit whose removal from the assessment rolls reduced the market value of the District's system.

The State, as bondholder, in addition to its inchoate lien on all the lands, had a present lien on the facilities of the District and when that lien is impaired, as it was by this taking, it is compensable.

The United States ought to be held to be estopped to deny its agreement to pay the District \$149,-

000.00 by its unconscionable conduct in allowing its authorized Contracting Officer to make an offer and then approximately one year after the acceptance of the offer, repudiating it.

The lands in Parcel II (as well as in Parcels I and III) are still in the District and the District, by law, must stand ready to serve them upon demand. The effect of the taking was to damage the District and the damages are not consequential but are direct and ascertainable in the usual manner, i.e., the market value of the whole before the taking, less the market value of the whole after the taking.

ARGUMENT

THE GOVERNMENT SHOULD BE ESTOPPED TO DENY ITS AGREEMENT

The United States, after making its own analysis, determined that the just compensation to be paid for the taking of Parcels I, II and III was \$149,000.00. Presumably, the Government felt that the State of Washington had some interest, as bondholder, and thus conditioned their offer upon the agreement of the District to pay off the outstanding bonds which then were in an amount of approximately \$145,000.00. The District accepted the offer of the Government with the condition and, prior to December 10, 1951, the United States presented to the District a form of agreement and resolution prepared by their officials. The agreement, as pre-

sented by them, called for the contracting officer, Corps of Engineers, Walla Walla District, to execute the agreement on behalf of the Government and he was the authorized officer of the Government, acting within the bounds of his authority. After the District accepted the offer and executed the written documents presented by the United States to them they were advised that "in the near future" the \$149,000.00 would be deposited in the registry of the Court and the matter would be closed by condemnation proceedings. The District was never advised that the Government was trying to avoid its own proposal for more than a year after it was made and accepted. Thus there was an acceptance which formed a contract between the District and the Government. In addition, the District relied upon the agreement both in their operation thereafter and in cooperating with the United States in facilitating the acquisition of other items not involved in the agreement.

It is recognized that as a general principal, the Courts have held that the Sovereign may not be estopped. On the other hand it is recognized that the doctrine of estoppel is based upon justice and good conscience. It is the contention of the appellant herein that the day has long since passed when the "King can do no wrong" and the principles of fairness and equity should be applied to the Government in its dealings with its citizens just as between private litigants.

The fact that the law is a living thing and is constantly growing and developing is evident from the fact that not many years ago, the principle that "The King Can Do No Wrong" was unassailable but in more recent years, the doctrine has been gradually deteriorating and appellant contends that it should be abolished. An example of the deterioration of the doctrine is seen in **Dayton Airplane Co. vs. United States** 21 F, (2d) 673 (6th Cir. 1927) where the Government sought to challenge an earlier settlement of a contract made during World War I. There was no dispute but that the Government representative had authority to make the settlement originally and the court held that the Government was estopped to challenge the earlier settlement, saying:

"In this class of contracts and for the effect of future emergencies, if for no other reason, a sound public policy must require that the government must keep its contracts and stand by its settlements as an individual must."

In that case the Court specifically held that under the facts therein involved, the United States should be bound by the rules of estoppel and fair play.

A similar holding is found in **United States vs. Big Bend Transit Co.** 42 F. Supp. 459 (E.D. Wash. 1941) where the Government was held estopped to challenge a corporation's title based on grants of water rights where the grants were predicated on

acts of Congress and documents executed by the Secretary of the Interior.

In another District Court case, **United States vs. Brabham**, 122 F, Supp. 570 (D. C. S. C. 1954) the court held the United States estopped to assert a lien by the Farmers Home Administration on a farmer's crop because it failed to circulate its customary list of mortgaged crops among persons accustomed to buy such crops.

This Court, in **Los Angeles vs. Borax Consolidated, Ltd.**, 102 F. (2d) 52, held that the City of Los Angeles was estopped to deny that a landowner obtained good title to certain tidelands where City Officials represented that the City held no interest in the tidelands.

The unpopularity of the doctrine that "the King can do no wrong" and its gross inequity has been highlighted by numerous law review criticisms among them being "Prerogative Fallacy 'That the Crown Is Not Bound by Estoppel'"., 49 L. Q. REV. 511, and "Estoppel Against the Government", 21 U. CHI. L. REV. 680.

Here, the United States, dealing with a municipal corporation whose very life is at stake, made an offer through an authorized representative of the Government which offer was accepted. The Government in all fairness and good conscience should be estopped to deny the validity and the binding effect of the agreement so reached.

THE RIGHTS OF THE STATE OF WASHINGTON AS BONDHOLDER HAVE BEEN IMPAIRED WITHOUT JUST COMPENSATION

The State of Washington is the bondholder of the Columbia Irrigation District and those bonds, by statute, are a direct and immediate lien on all of the water rights and other property of the Irrigation District including canals, ditches and other facilities. R. C. W. 87.16.090. The provisions of this statute are recognized and enforced in **Clancy vs. Columbia Irrigation District**, 121 Wash. 79, 208 Pac. 27 and **State Ex Rel. vs. Hartung**, 150 Wash. 590, 274 Pac. 181. The United States took some of the canal facilities (though trivial in amount) and indirectly the government took the facilities of the District and their established water right, in part, by depreciating the value of those facilities. This has a direct effect upon the effectiveness of the bondholder's lien and constitutes a taking. It is recognized that the inchoate lien of a bondholder has no standing in law under these circumstances but we are here dealing with an actual present lien, as contrasted to an inchoate lien. This interest was taken without compensation of any kind being paid.

JUST COMPENSATION SHOULD BE PAID FOR THE LOSS IN MARKET VALUE OF THE DISTRICT'S FACILITIES

Appellant contends that Parcels I, II and III should not have been segregated as they comprise

a contiguous unit whose removal from the assessment rolls reduced the market value of the District's system. The fee titles taken in Parcel I and the interest taken in Parcels II and III result in a severance damage. The Trial Court refused the District's offer to prove that the total damage, measured by the reduction in the market value of the District as it existed before the taking and the market value as it existed after the taking, was \$250,000.00. The District Court held that these damages, though real, were consequential and therefore non-compensable.

Appellant contends that it is inconsistent to hold that the Government could acquire anything in the taking of Parcel II, and simultaneously to hold that no compensable interest exists. If the Government took no property rights from the District by the taking of Parcel II in this proceeding, then the proceeding should have been dismissed as to Parcel II since there was nothing to be acquired. On the other hand, the Court specifically held that "all right, title and interest of the Columbia Irrigation District, a municipal corporation, defendant herein, in and to the lands in Parcel II—are hereby held and confirmed to have vested in the United States of America." If something vested in the United States by this judgment, that something must be a property right taken by the United States for which just compensation must be paid.

This is not a case where a business in the neigh-

borhood has a loss of business resulting from the taking since third parties who formerly patronized the business would no longer be patronizing it, or in other words, this is not a case involving consequential damages. This is a case involving the actual taking of lands and facilities from a District and severing them from the remainder causing a direct and immediate loss in the market value of the whole. This we submit is a direct loss which is compensable under the law.

The United States has not and did not exclude the lands taken in Parcel II (or in Parcels I and III) from the Irrigation District and under the Laws of the State of Washington, the District may be compelled to furnish service to irrigable lands within the boundaries of the District.

“As soon as any public lands situated within the district are acquired by any private person, or held under any title of private ownership, the owner thereof shall be entitled to receive his proportion of water as in case of other land owners . . .” R. C. W. 87.01.210.

The appellant offered to prove that some of the lands involved in Parcel II are actually excessive to the Government's needs and may very well be declared excess and sold into private ownership at some future date. If this occurs, the Government would no doubt sell the excess lands as irrigated land which has a high value compared to the negligible value of the same land where irrigation water

is not available. Thus the Government may reap the benefit but under the decision of the District Court, they need not pay for it.

While it is true that this case is unique in its facts, insofar as the writer of this brief can ascertain, (usually there are other lands that can be brought within a district to utilize the excess capacity or the entire district is taken or a relatively trivial portion of the district is taken) nevertheless, a somewhat similar situation arose in the case of **Baetjer vs. United States**, 143 F. (2d) 391 (CCA 1st) where the condemnee owned various non-contiguous tracts of land devoted to the growing of sugar cane and also owned extensive facilities for the refining of sugar. The contention of the Government in that case was that the loss was a non-compensable business loss and the District Court struck all evidence on the matter of severance damages. The First Circuit Court of Appeals reversed saying in part:

“If it (the excluded evidence relating to severance damage) means that after the taking the appellant’s mills had an uneconomic over capacity so that they could not be operated by the appellant as efficiently and therefore as profitably as before the taking, then the stricken evidence shows only loss of business, which resulted as an unintended incident of the taking, and so a loss not compensable under the doctrine of **Mitchell vs. United States**, *supra*. (267 U. S. 341). On the other hand, if it means, and there is other evidence tending to show that this is what the witnesses, who used the

phrase, meant by it, that the overcapacity of the mills, with respect to cane lands available to supply them, has depreciated their value on the market—then the evidence would tend to show a compensable loss. In short, the stricken evidence would indicate a compensable loss only if it means that after the taking the appellant's mills had an uneconomic over capacity, so that they would not be operated by anyone as efficiently and therefore as profitably as before the taking, this being a matter which a hypothetical willing buyer would consider, in determining what he would pay for the property."

This, we submit, is exactly the nature of the offered proof of the appellant in this case since the appellant offered to prove that after the taking of the lands involved a willing buyer would pay \$250,000.00 less for the District as an operating entity than it would have before. This, as the First Circuit Court of Appeals holds, would constitute a compensable loss.

A closely similar situation was involved in **United States vs. Aho, et al**, 68 F. Supp. 358, where Judge Fee made a careful analysis of the facts. In that case, a drainage district having a gravity flow system asserted that its facilities had lost market value by reason of the taking of a portion of the lands in the district from individual owners. Both the pertinent Oregon statutes and the pertinent physical situation involved are virtually identical with the statutes and situation involved in this case. There, a gravity flow drainage system was

involved from which the Government would benefit and here a gravity flow irrigation system is involved from which the Government, at least potentially, may benefit by either using the lands not flooded by the McNary Reservoir or the sale of those same lands at a high price. In both cases, the lands benefitted by the facility are practically valueless without the facility and the facility operates at virtually the same cost regardless of the area served. In holding the interest of the drainage district compensable Judge Fee made the following comments:

“It has been consistently recognized that the reclamation of swamp and overflowed lands is of utmost importance to the communities involved and is touched with the public interest . . . If the costs had exceeded the benefits to all the lands in the District, the plan would have been rejected and the District dissolved.

“The history of drainage and irrigation districts in the past few years has shown that these cooperative structures for specific purposes are subject to special dangers. If the plan of reclamation was not feasible because sufficient income was not collected for maintenance, The District would be unable to function in its essential capacity. If a portion of the lands became unproductive and unable to bear the weight of assessments, and the District did not receive income therefrom, it was in grave difficulty. This was emphasized in the depression where many parcels did not raise profitable crops and the payment of assessments went into arrears, and the District was required to levy higher assessments which fell

upon the better lands, whereby these likewise became unprofitable. The burden of delinquencies spread in geometrical proportion. By such disasters these entities created for the public purpose of reclamation of lands, were rendered helpless and after the passage of the Municipal Bankruptcy Act, many of them sought refuge under its aegis . . . If the United States condemns a certain proportion of these lands and thereafter refuses to pay the assessments, like results will follow in the District. If the United States had taken the parcels covered by the main drainage canals, and the parcel which contains the disposal pumps, and thus prevented the disposal of the waters, the District would likewise have ceased to function, but there compensation would be paid not only to the District for the physical properties taken, but also to the District as representative of the individual owners for the destroyed easements.

* * *

“The physical properties of water dictates the boundaries of a Drainage District. No less imperatively, economic feasibility dictates the size and cost of the works. The initial plan for development of these works is dependent upon these factors. All this points to the conclusion that the United States should pay the annual assessments to prevent disaster in projects created for a public purpose. But it is conceded that liability can neither be predicated upon need alone, nor solely upon public policy.

“The United States has, however, often paid compensation to a public corporation where easements or functions exercised for the benefit of the public at large, or those within the boundaries of the municipality were used or carried on at increased cost or inconvenience

by virtue of displacement, although strict property rights may not have been involved."

The soundness of the reasoning of the **Aho case** is emphasized in **Goodyear Farms vs. United States** 241 F. (2d), 484 (C. C. A. 9) where this court pointed out that "Not only the reasonable market value of the full fee simple title, **but every right in the land must be paid for.** Easements for ditches, for flow of water thereon and the right to payment therefor must be compensated if the evidence show these exist." (Emphasis supplied)

In that same case the court points out that the final judgment must read "just compensation for all property rights taken or destroyed. Otherwise the guarantee of the Fifth Amendment is not met." At a later point in the same decision we find the following:

"The judgment, to be final, must either grant or deny compensation for the claimed interest of an easement burdening the land condemned, for ditches, works, the right to flow water thereon, and the right to collect compensation therefore, otherwise it is not final as to them."

In the **Goodyear** case a technical procedural question was involved so that the water company, in that particular proceeding, could not secure compensation. It should be noted that in our case, when the lands involved in Parcel II were taken from private owners, the District was not a party

in any way and in many of the cases, the land was acquired without condemnation proceedings so even had the District had knowledge, they could not have intervened since there were no proceedings. Thus, the only procedural way in which the District may be compensated for their rights is in this proceeding. The United States has recognized this obvious fact by instituting this very proceeding. As mentioned above, had the District had no right, title or interest in the lands in Parcel II there would be no reason to institute this proceeding, nor would there be any purpose in entering judgment.

The factual situation in this case should not be confused with cases where there is no contention of a loss of market value as in the case of **Yoknapatawpha Drainage District No. 2 vs. U. S.**, 242 F. (2d) 925 where the claim is based on the theory that there is a lien on the land taken whereas, in fact, the lien is only an inchoate lien or cases where none of the defendant's physical properties are situate on the lands taken.

The Supreme Court of the State of Washington in August of 1958 in the case of **Ackerman vs. Port of Seattle**, 152 Wash. Dec. 663, at page 668, quotes the words of Justice Holmes in **Pennsylvania Coal Company vs. Mahon**, 260 U. S. 393, as follows:

“ . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change . . . ”

And in the same opinion at page 666 they quote Judge Traynor of the Supreme Court of California as follows:

“More than ever social problems find their solution in legislation. Endless problems remain, however, which the courts must resolve without benefit of legislation. The great mass of cases are decided within the confines of stare decisis. Yet there is a steady evolution, for it is not quite true that there is nothing new under the sun; rarely is a case identical with the ones that went before. Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values. And in those cases where there is no stare decisis to cast its light or shadow, the courts must hammer out new rules that will respect whatever values of the past have survived the tests of reason and experience and anticipate what contemporary values will best meet those tests. The task is not easy—human relations are infinitely complex, and subtlety and depth of spirit must enter into their regulation. Often legal problems elude any final solution, and courts then can do no more than find what Cardozo called the least erroneous answer to insoluble problems.”

We submit that under the particular facts of this case, which are unique, the market value of a public corporation has been so depreciated by the action of United States in acquiring the land in Parcel II that a failure to compensate for the loss in the market value amounts to making a public improvement (McNary Reservoir) by a much short-

er cut than the constitutional way of paying for the change. The outstanding bonds are a millstone around the District's neck incurred to construct a facility which is now too large for the available consumption. Without the removal of that indebtedness (which can only be accomplished by the payment of just compensation in this case) the death knoll of the district has been tolled. The District Court, unfortunately, while recognizing the problem, reluctantly concluded that its hands were tied. Appellant submits that the hands of the Court must not be tied when just compensation must be paid.

Respectfully submitted,

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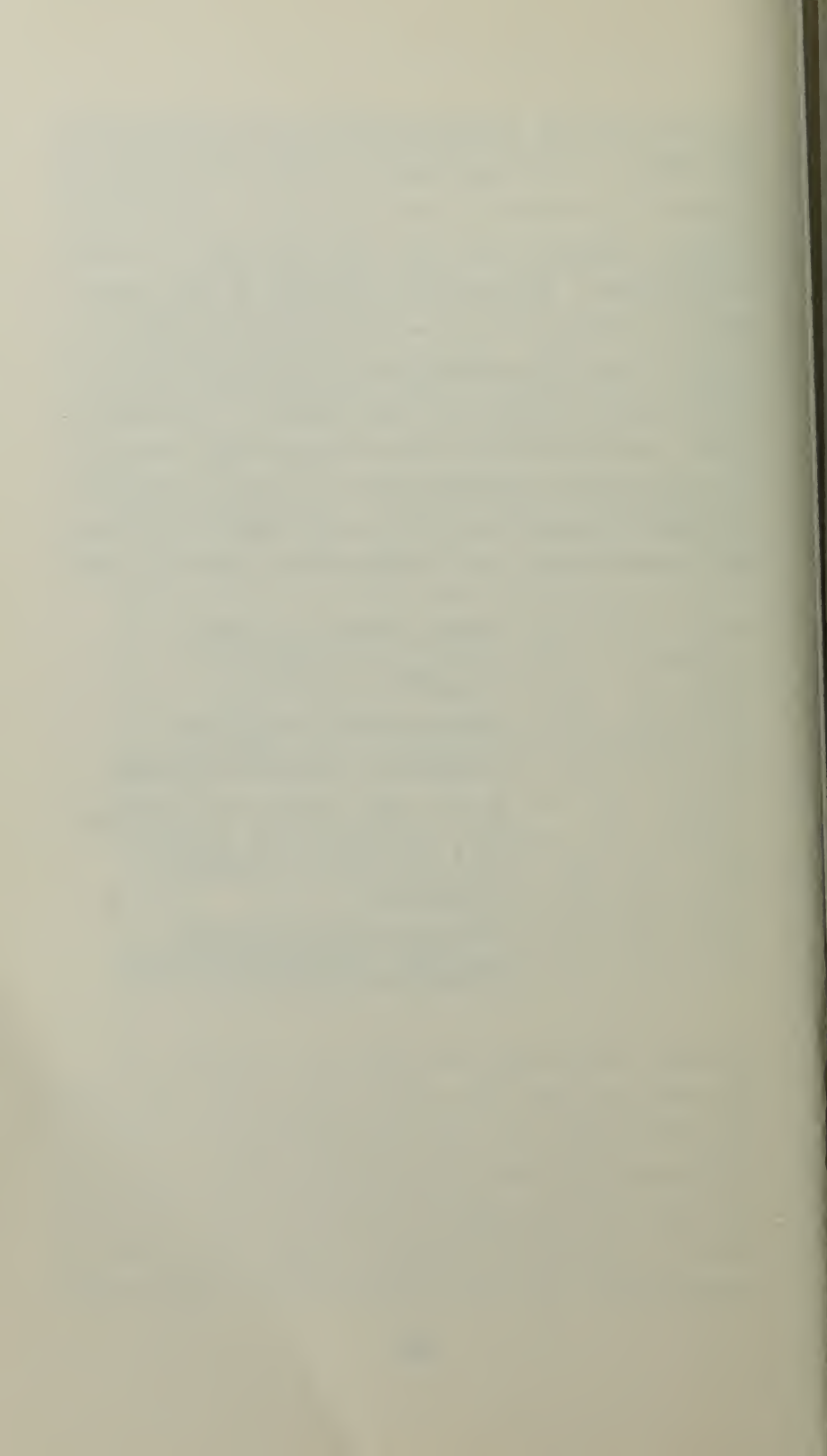
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In the United States Court of Appeals
for the Ninth Circuit

COLUMBIA IRRIGATION DISTRICT, a corporation,
APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE.

STATE OF WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE.

Upon Appeals from the United States District Court
for the Eastern District of Washington,
Southern Division

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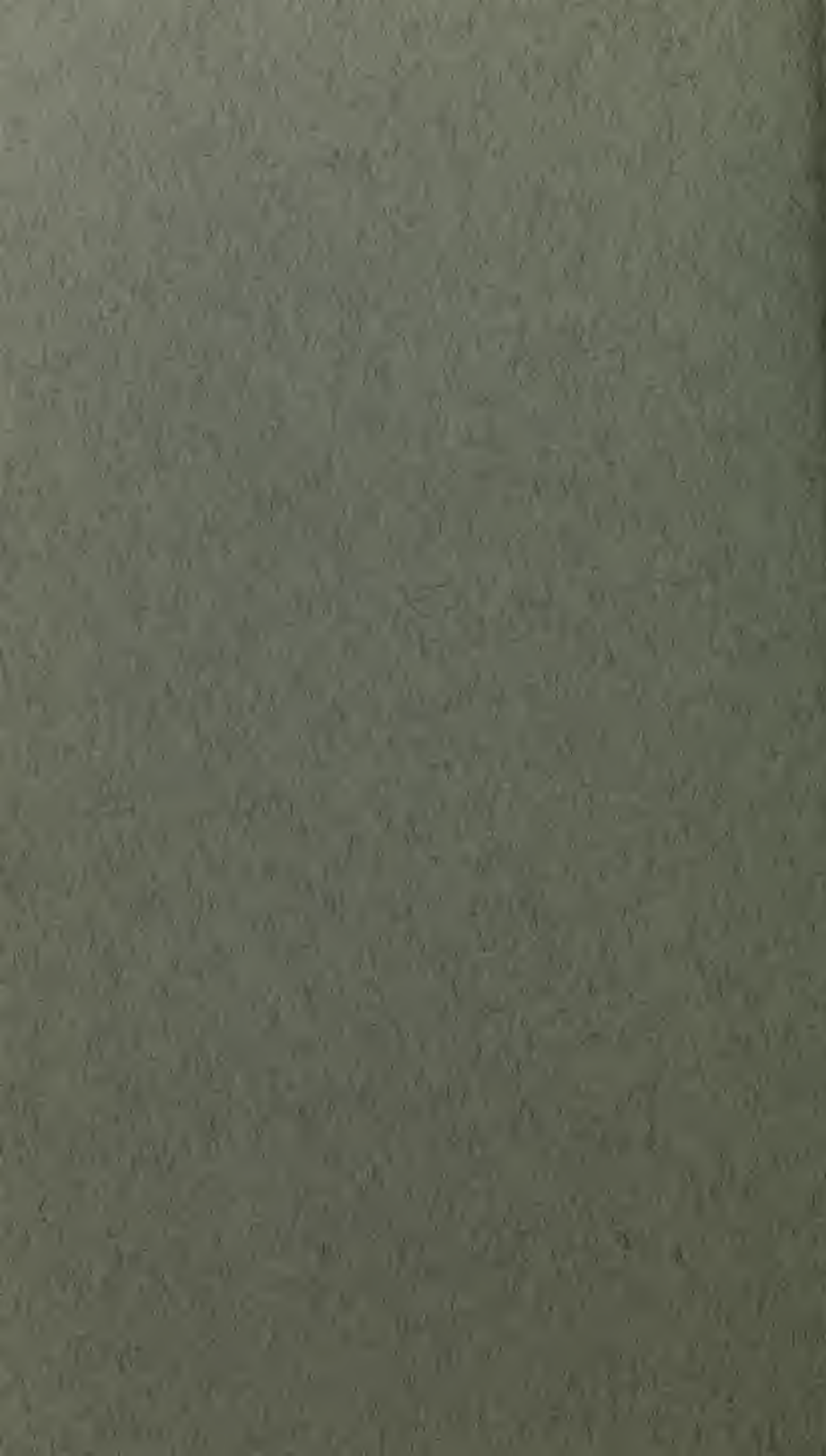
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In the United States Court of Appeals
for the Ninth Circuit

No. 16047

COLUMBIA IRRIGATION DISTRICT, a corporation,
APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE.

STATE OF WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE.

Upon Appeals from the United States District Court
for the Eastern District of Washington,
Southern Division

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion. A letter to counsel dated December 11, 1956, from the trial judge (the late Hon. Sam M. Driver) in which

his views are stated is printed in the appendix hereto, *infra*, pages 26-31. Findings of fact, conclusions of law and judgment by the district court appear in the record at pages 76-82.

JURISDICTION

These are appeals from a judgment entered by the district court on April 1, 1958 (R. 80-82). The jurisdiction of the district court was invoked by the United States under the Act of April 24, 1888, 33 U.S.C. sec. 591, and other statutes authorizing condemnation to acquire lands for the purpose here involved and appropriating funds therefor (R. 3). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether the district court properly held that the appellants were not entitled to recover severance damages in the circumstances of this case.

STATEMENT

While this case originally involved other parcels of land and other questions, these appeals raise the single question as to whether the district court properly held that the appellants were not entitled to recover severance damages in the circumstances of this case to Parcel II consisting of Segments F, G, H, J, K, L, P, Q, R, S, and T as described in Exhibit "A" to the amended complaint¹ (R. 19-52). It is be-

¹ The appellant Irrigation District raised a question at the trial concerning Tract J-473, or portion thereof, containing 9.7 acres of land, which was a continuation of a canal right

lieved that the facts in connection with that ruling may fairly be summarized as follows:

This proceeding was instituted by the United States in December, 1952, to acquire all right, title and interest of the Columbia Irrigation District in 3,479.73 acres of land for use in connection with the McNary Lock and Dam Project. Possession was granted effective March 31, 1953. An amended complaint was filed in December, 1954, to acquire the fee simple title to Parcel I consisting of 13 tracts of land and containing 132.42 acres; all right, title and interest of the Columbia Irrigation District in Parcel II (the parcel here involved) consisting of eleven segments containing 3,292.71 acres, as to which the United States had acquired fee or easement title by direct purchase or by condemnation from private owners other than appellant Irrigation District;² and perpetual easements for flowage purposes and for a drainage ditch over two tracts containing a total of 0.58 of an acre designated as Parcel III.

Appellant State of Washington is the holder of a

of way immediately to the north of Tract J-484 in Parcel I. As it appeared in the original complaint Tract J-473 was eliminated and the 9.7-acre portion of the canal was incorporated into the Segment "J" description set forth in Parcel II of the amended complaint. Trial counsel has advised that because the canal right of way did not properly belong in Parcel II since it was land owned by the District, the court ruled that it would consider the complaint amended to incorporate Tract J-473 with the other Parcel I tracts. It was so valued.

² All assessments due the District to the date of the acquisition by the United States were paid in full.

bond issue of the appellant Columbia Irrigation District. Though the State had originally not been joined as a party, in December 1955 it was so joined and served with notice so that any claim it had as holder of the bonds could be adjudicated in the proceeding. A motion by the State that it be dismissed from the action as not a necessary or proper party was denied by the court.

Neither the appellant Columbia Irrigation District nor the appellant State of Washington held any "title, either legal or equitable, to the lands described as Parcel II herein or any part thereof" (Findings of Fact Nos. IV, V, R. 78). The lands described within Parcel II were as of the commencement of the action included within the boundaries of the Irrigation District and had, prior to their acquisition by the United States, been subject of assessment by the Irrigation District (R. 78).

Approximately 1,758 of a total of roughly 11,086 acres within the Irrigation District were taken in connection with the project here involved. Though it was stipulated "that the District owned no portion of said lands in Parcel II" (R. 75), the appellant Irrigation District claimed severance damages as a result of the taking in this case. Its theory was that the taking of land within the boundaries of the district left it with an oversized plant for the area to be served and hence a reduction in the value of its remaining assets. With the appellant Irrigation District having stipulated that it did not own the lands which had been acquired in Parcel II (R. 57-58, as corrected by stipulation dated Oct. 30, 1958 filed in

this Court, 73-74, 75), the Government contended that under *United States v. Honolulu Plantation Co.*, 182 F.2d 172 (C.A. 9, 1950), cert. den. 340 U.S. 820, no severance damages should be paid.

Accordingly, in June, 1956, the Government filed a petition for judgment as to Parcel II, praying, *inter alia*, that a decree be entered determining that neither the Columbia Irrigation District nor the State of Washington held any compensable interest in the lands described in Parcel II. At the hearing on the petition, the district court treated the Government's petition as a motion for summary judgment and there was raised the question as to whether factual issues had been presented which would prevent decision by summary judgment.³ Under the date of October 9, 1958, a formal order was signed by the district court denying the Government's petition for judgment as to Parcel II.

Thereafter, by letter to counsel dated December 11, 1956 (appendix, *infra*, pp. 26-31), the district judge (the late Hon. Sam M. Driver) advised that he had reconsidered the Government's petition for judgment as to Parcel II and was prepared to rule upon that petition favorably to the Government's contention. A pertinent paragraph from that letter follows (appendix, *infra*, pp. 27-28):

³ The purpose of filing the petition was to secure a ruling by the court as to whether or not the Columbia Irrigation District or State of Washington had any compensable interest in Parcel II at the time of the taking and the petition was not intended as a motion for summary judgment.

On June 13, 1956, the plaintiff moved for summary judgment as to the property in Parcel II. The defendant irrigation district filed an affidavit resisting the motion. The court on the 9th day of October, 1956, entered an order denying the motion. As indicated by my comments when the motion was argued, I thought that factual issues had been raised by defendant irrigation district's affidavit which would prevent decision by summary judgment of the question whether the district has any compensable interest in Parcel II. At that time I expressed the opinion that the district did have such an interest. It seemed to me that the equities heavily favored the district and I may very well have been unduly influenced by that consideration. At any rate, I had misgivings which induced me to reexamine the question whether the district has any compensable interest in Parcel II. I have reread briefs of counsel and examined authorities cited, and I have come to the conclusion, reluctantly I must admit, that the district is not in law entitled to any compensation for the taking of the Parcel II lands. The conclusion is inescapable, I think, under *United States v. Honolulu Plantation Co.*, 9 Cir., 182 F.2d 172. Judge Fee in his opinion for the court emphasizes the principle that an owner in a condemnation case may not recover so-called severance damage; that is to say, where less than the whole of a tract of land is taken, the diminution in value of the remainder by reason of the taking of the part, unless there is one fee owner-ship of the entire tract. Tract, of course, in this sense may mean noncontiguous parcels of land, provided they are used as a

unit in connection with a business or farming operation, or are capable of such use in the reasonably near future.

Pursuant to a suggestion by the court, in February 1957 a declaration of taking was filed and the sum of \$6,779.00 was deposited as estimated just compensation for the taking of Parcels I and III. In response to further argumentative material from the Irrigation District upon the subject of its alleged compensable interest to Parcel II, the district court replied to the effect that it was still of the opinion previously announced that the Irrigation District had no compensable interest in Parcel II. A jury trial was waived and the question of valuation as to Parcels I and III was tried to the court.

The action came on regularly for trial on February 17, 1958 (R. 55, 76, 80). With respect to Parcel II the district court adhered to its ruling that neither the Columbia Irrigation District nor the State of Washington had a compensable interest in that parcel. Appropriate findings of fact, conclusions of law, and judgment were entered (R. 76-82).⁴ Thereafter both the Columbia Irrigation District and the State of Washington filed notices of appeal (R. 82-84).

ARGUMENT

Introductory: The following facts should be borne in mind: Parcel II represents lands acquired by the

⁴ Appropriate findings of fact, conclusions of law, and judgment were also entered with respect to Parcels I and III. No appeal has been prosecuted with respect to those parcels.

United States by direct purchase or in other condemnation proceedings. The value of the Irrigation District's facilities was included in the enhanced value paid for the lands acquired from the individual owners (*United States v. Priest Rapids Irr. Dist.*, 175 F.2d 524, 531 (C.A. 9, 1949)) and all assessments due the Irrigation District to the date of acquisition of the land were paid in full. Consequently the United States has paid the full value of that land and any award to appellants would necessarily constitute the compelling of a payment in excess of fair market value. The want of merit in the appellants' attempts to have this Court upset the sound determination of the District Court that such excess payment is not required will now be shown.

I

Appellants Have No Contract Right To Any Payment

In Point II, *infra*, we show that the District Court was correct in its ruling in this case under well-established principles of law. In order, however, that this Court will not be led away from the true factual situation by statements appearing in the appellants' brief, we feel it advisable at the outset to show that much of appellants' argument has no valid basis in fact.

In what purports to be their factual statement of the case, appellants speak of an alleged attempted repudiation of an agreement on the part of the United States (Br. 2). This notion is many times adverted to by the appellants. For example, the first heading in the argument section of their brief is entitled "The

Government Should Be Estopped To Deny Its Agreement" (Br. 5). Over the course of the next few pages, the alleged "agreement" is referred to frequently (Br. 5-8).

The fact is, as was made clear to the trial court, that a written contract was contemplated which never reached the stage of being executed on behalf of the United States. There were valid reasons why such proposed agreement should not be ultimately accepted on the part of the United States, and the unassailable fact is that the agreement was never consummated.⁵ The record makes this perfectly clear (R. 65-67).⁶ Indeed, while appellants thereafter refer to the proposed agreement as though it were in fact a validly signed one, in their own "Statement of the Case and Questions Involved", appellants note that " * * * the agreement *was to be* signed by the 'Contracting Officer, Chief, Real Estate Division, Corps of Engineers, Walla Walla District.' " (Br. 2, Em-

⁵ For the information of this Court, in the course of the regular administrative review given to such proposed contracts on behalf of the United States, it was found that the basis of appraisals on which the amount of the proposed payment had been calculated was erroneous and that the difference between such appraisals and appraisals made on a proper basis was substantial. Consequently, the proposed agreement was not made. While it is believed that ample legal authorities support the contention of the United States in this respect, the phase of the case involving this matter is not on appeal and need not be considered by this Court. Hence, further detailing of the matter is unwarranted.

⁶ The proposed agreement, unexecuted on the part of the United States, was marked for identification as Defendant's Exhibit No. 1 (R. 67).

phasis added). They do not—and, of course, cannot properly—allege that the proposed agreement was ever signed by that official or anybody else authorized to bind the United States. The protection of the public interest is the very reason why proposed contracts to bind the public purse are required to be in writing and to go through established review procedure before the United States is bound by the affixing of the signature of the official authorized to sign the proposed contract.⁷

As to appellants' frequent references to estoppel, in their attempt to bind the United States by this unauthorized contract, it is too well settled by the Supreme Court and applicable decisions of this Court that the principle of estoppel does not apply against the United States in such situations as here presented to warrant discussion of the cases relied upon by the appellants (Br. 5-8). E.g., *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-384 (1947); *United States v. California*, 332 U.S. 19, 40 (1947); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-409 (1917); *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 334 (C.A. 9, 1956), cert.

⁷ In *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 337 (C.A. 9, 1956), cert. den. 352 U.S. 988, a case involving another irrigation district in the State of Washington, this Court takes occasion to note as being worthy of criticism a failure, prior to approval of a proposal, to obtain legal advice "as to the validity or the advisability of the proposed agreement." In that case the written agreement had actually been signed and it was there ultimately held to be within the authority of the Government officials who approved it.

den. 352 U.S. 988; *Jones v. United States*, 195 F.2d 707, 709-710 (C.A. 9, 1952); *United States v. Walker Irr. Dist.*, 104 F.2d 334, 339 (C.A. 9, 1939); *Chancellor-Canfield Midway Oil Co. v. United States*, 266 Fed. 145, 150 (C.A. 9, 1920). As these cases make clear, estoppel does not apply against the Government even though the case presents phases of hardship. See particularly *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. at pages 383-384. Indeed, an administrative determination, even when spelled out in a letter, does not constitute an estoppel against the Government. *Walker-Hill Co. v. United States*, 162 F.2d 259, 263 (C.A. 7, 1947), cert. den. 332 U.S. 771.

II

Under Well Established Principles The District Court Was Correct In Its Ruling In This Case

Initially, another basic fallacy is present in the appellants' case. Thus, they would have it appear that there is something inconsistent in the fact that it was held that they had no compensable interest but that it was held that "All right, title and interest of the Columbia Irrigation District, a municipal corporation, defendant herein, in and to the lands in Parcel II—are hereby held and confirmed to have vested in the United States of America." (Br. 10). The appellants, in effect would read into their being named parties defendants an acknowledgment of some compensable interest. Thus they state (Br. 17): "As mentioned above, had the District had no right, title or interest in the lands in Parcel II there would be no reason to institute this proceeding, nor would

there be any purpose in entering judgment.” (See also Br. 3, 10). But this completely overlooks the fact that in order to quiet its title and remove clouds therefrom, the United States with some frequency names as defendants in condemnation actions parties whom it contends have no compensable interest. E.g., *United States v. San Geronimo Development Co.*, 154 F.2d 78, 82-83 (C.A. 1, 1946), cert. den. 329 U.S. 718; *United States v. 10,245 Acres of Land, more or less, in Grant County, Washington*, 50 F.Supp. 470 (E.D. Wash. 1943). This is particularly so in situations, such as here presented, where the United States has previously acquired the fee title either by purchase or condemnation from the former owners⁸ (R. 57, 58 as amended by stipulation dated Oct. 30, 1958 filed in this Court, 73-74, 78). And since it was found as a fact that the United States had acquired fee estates “by condemnation or direct purchase, from their said owners” and that neither the Columbia Irrigation District nor the State of Washington, appellants herein, held any title, either legal or equitable, to any part of the lands described as Parcel II (Findings of Fact IV, V (R. 78)), it was particularly appropriate here for the judgment to

⁸ Indeed, in the instant case, in an affidavit filed in the District Court on June 13, 1956, Max K. Tysor, Chief, Real Estate Division, Walla Walla District, Corps of Engineers, deposes, *inter alia*, as follows: “This proceeding as to Parcel II was commenced for the sole purpose of clearing the title to the lands included in said parcel and the filing of this proceeding is not intended to in any way admit that said defendants hold any interest in said property or are entitled to any payment of compensation herein.”

quiet the Government's title by stating expressly that "All right, title and interest of the Columbia Irrigation District * * * in and to the lands in Parcel II * * * are hereby held and confirmed to have vested in the United States of America." (R. 82).

A. *Severance damages were properly excluded in this case.* Going more to the merits, the claim of the appellants is that severance damages should have been awarded as a result of the taking of Parcel II lands in this case and that the District Court committed reversible error in failing to award such damages. But, under the facts of this case, the prime requisite for application of the so-called severance damage rule is not met. For the rule to apply, only part of a tract of land in one ownership must have been taken so that a residue remains which has been diminished in market value. In such a case, just compensation for the taking includes the lessened value of the residue. E.g., *Bauman v. Ross*, 167 U.S. 548, 574 (1897); *United States v. Grizzard*, 219 U.S. 180, 183 (1911); *United States v. Honolulu Plantation Co.*, 182 F.2d 172 (C.A. 9, 1950), cert. den. 340 U.S. 820. In the last-cited case, this Court expressly stated that (pp. 175-176): "The rule applies exclusively to condemnation of fee simple title of a tract in one ownership."

In the instant case it is beyond cavil that the Parcel II lands were not a part of one ownership with lands involved in Parcels I or III. This is so both by express finding of the District Court and by stipulation of the appellant Columbia Irrigation District. Thus, "At the time of commencement of this action and thereafter, defendant Columbia Irrigation Dis-

trict, a municipal corporation, held no title, either legal, or equitable, to the lands described as Parcel II herein or any part thereof." (Finding of Fact IV, R. 78). Similarly, "At the time of the commencement of this action and thereafter, the defendant State of Washington held no title, either legal or equitable, in and to the lands described as Parcel II herein, or any portion thereof; * * *" (Finding of Fact V, R. 78).⁹ And the record makes clear that it was stipulated that "the District owned no portion of said lands in Parcel II" (R. 75). Since the appellants "owned no portion" of the lands in Parcel II, such lands obviously were not the residue of a larger tract in one ownership and so the severance damage rule has no application. *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 175-176 (C.A. 9, 1950), cert. den. 340 U.S. 820.

While what has been stated is believed adequately to answer appellants' argument, it is submitted that analysis of decisions relied upon by the appellants and of decisions of this Court, particularly in the *Honolulu Plantation Co.* case, *supra*, remove any doubt as to the correctness of the judgment of the District Court in this case. Thus, the fallacy of attempting to apply the theory, of "severance damages" to the circumstances of the Columbia Irrigation District lies primarily in the fact that the District has parted with no property right as to Parcel II, and yet seeks to recover compensation for the "severance" of lands not owned by it. *Baetjer v. United States*,

⁹ The sole interest of the State of Washington in this case is as holder of the bonds of the Columbia Irrigation District.

143 F.2d 391 (C.A. 1, 1944), cert. den. 323 U.S. 772, relied upon by the appellants (Br. 12), is inapposite since it deals with the taking of a portion of two parcels of land *all owned by the appellant*, a trust-holding company. It follows that in the proper case, the issue of decreased market value of a mill property by reasons of overcapacity, could become material if it could be established that such property, *singly-owned and operated as a unit*, was so affected by a partial taking from the ownership.¹⁰

Rather than the *Baetjer* case, the circumstances of the Columbia Irrigation District fall within the rule of *United States v. Honolulu Plantation Co.*, 182 F.2d 172 (C.A. 9, 1950), cert. den. 340 U.S. 820. The latter case illustrated the same contention, i.e., a claim for "severance damages" because of loss of value of defendant's properties as an operating concern by reason of condemnation of property held in fee by third parties creating a shortened supply of raw materials resulting in an overcapacity of defendant's sugar mill and refinery. The company owned a very small part of the land supplying the cane, the greater portion of which came from lands neither owned or leased by it. After making the statement previously referred to (*supra*, p. 13) that "The rule applies exclusively to condemnation of fee simple title of a tract in one ownership.", this Court there went on to state that "Since Plantation had no

¹⁰ In this connection, the District Court stated: "The case of *Baetjer v. United States*, 1 Cir., 143 F.2d 391, I think, is distinguishable * * *. Even if there were a conflict between that case and *Honolulu Plantation* case, decided by the Ninth Circuit, the latter would govern." (Appendix, *infra*, p. 28).

property interest in the lands condemned, this claim is for business losses.” (182 F.2d at p. 177) which were then shown, by citation of numerous authorities (ibid. fn. 9), to be plainly nonrecoverable.

Because of its pertinency, one further quotation from the opinion in the *Honolulu Plantation Co.* case should be made. There this Court said (182 F.2d at pp. 178-179):

The rule requiring compensation for loss in market value of the remainder of the tract is applied strictly only where there is but *a single parcel owned by one party in fee simple*. An extension of the doctrine permitted the inclusion of another parcel *in the same ownership* if it lay contiguous to the principal tract. * * * With some reluctance the courts have held that the owner of *one parcel in fee* may be compensated for loss in market value thereof as a result of the taking of another parcel *owned in fee by him*, even if the latter is not contiguous, provided that, by actual and permanent use, a unitary purpose is served by both parcels. * * (Emphasis added).

These principles were but recently reemphasized by this Court by quotation of the above language in *Cole Investment Co. v. United States*, 258 F.2d 203, 205 (1958). In the words of the District Court: “The district is not entitled to so-called severance damage by the clearly stated principles announced in the Honolulu Plantation Company case.” (Appendix, *infra*, p. 28).

Since appellant Columbia Irrigation District and appellant State of Washington “held no title, legal or

equitable" to the lands described as Parcel II (Findings of Fact IV, V, R. 78) and, in fact, it was so stipulated (R. 75), it is unnecessary for the United States to rely upon the cases, including some cited by this Court in the *Honolulu Plantation Co.* case (182 F.2d at p. 179, fn. 23), which spell out that interests short of actual ownership (*State v. Superior Court for Spokane County*, 10 Wash. 2d 362, 371, 116 P.2d 752, 756 (1941); *McIntyre v. Board of County Com'rs*, 168 Kan. 115, 118-121, 211 P.2d 59, 63-64¹¹ (1949)) or different interests in different parcels (*Conness v. Indiana, I. & I. R. Co.*, 193 Ill. 464, 470-471, 62 N.E. 221, 223 (1901); *Glendenning v. Stahley*, 173 Ind. 674, 683-684, 91 N.E. 234, 238 (1910); *Tillman v. Lewisberg & N.R. Co.*, 133 Tenn. 554, 182 S.W. 597 (1916); *Duggan v. State*, 214 Iowa 230, 233, 242 N.W. 98, 99 (1932)) do not warrant recovery of severance damages. However, those cases fully support the judgment of the District Court which is here challenged.

And since the appellants held no estate in the lands described in Parcel II and such lands are in no way a residue of property owned by the appellants, the

¹¹ This case summarizes the principle involved as follows (168 Kan. at pp. 120-121, 211 P.2d at p. 64): "The theory of compensation in eminent domain cases is that the owner is to be compensated fully for all land taken from him, including the diminution in value of that remaining owned by him, but full compensation does not include diminution in the value of the remainder caused by the acquisition of adjoining lands of others for the same undertaking. See Annotation at 170 A.L.R., beginning at page 721; also *State, ex rel Wirt, v. Superior Court*, 10 Wash. 2d 362, 116 P.2d 752."

issues as to Parcel II are clearly severable and could properly be determined separately as a matter of law.

B. *Future assessments are not liens against the land involved because lands belonging to the United States are not taxable.* In relying upon the decision in *United States v. Aho*, 68 F.Supp. 358 (D. Ore. 1944) the appellants have necessarily departed from the apparent basis of their claim for compensation, i.e., the theory of "severance damage", for the theory of a lien upon the lands within Parcel II for future assessments. This follows since the *Aho* ruling is to the effect that the lands within a drainage district, regardless of acquisition by the sovereign, remain liable to future assessment under Oregon law. In the *Aho* case, and its companion, *United States v. Florea*, 68 F.Supp. 367 (D. Ore. 1945), this purported continuing liability is construed to be a common law lien, or burden running with the land.¹²

Insofar as the appellants rely on *United States v. Aho*, 68 F.Supp. 358 (D. Ore. 1944) or similar cases, it should be noted (1) that they are distinguishable from the present case; and (2) that, as construed by appellants, they are contrary to established and well-recognized principles. In any event the decisions in the *Aho* and *Florea* cases were interlocutory and not finally appealed since settlements were reached with the parties involved. Thus, it has been made clear by the Supreme Court that the United States cannot be

¹² In the District Court the appellants also relied upon the *Florea* case and could possibly have in mind doing so again in any reply brief which they may file. For this reason, both the *Aho* and *Florea* cases are included in the discussion to follow.

held liable for future assessments. *Mullen Benevolent Corp. v. United States*, 290 U.S. 89 (1933). The *Mullen* case was brought in the District Court for Idaho under the Tucker Act, by bondholders of improvement district bonds, to recover from the United States after Government acquisition of all the lands contained in the districts. After an analysis of the matter, the Supreme Court there concluded that the acquisition of the lands did not constitute a taking of the bondholder's property, but at most only frustrated future action by way of assessment for which recovery could not be had. It should be noted that in the instant case the State of Washington, as holder of a bond issue of the Columbia Irrigation District, is in the same position as the Mullen Benevolent Corp. in the case by that name. The bondholder State of Washington, or for that matter the Columbia Irrigation District, had no lien, other than for annual assessments, when levied, upon the lands within the district. It is submitted that the *Mullen* case completely covers the State of Washington as well as the Columbia Irrigation District in the case at bar. Decisions of other courts are to the same effect. E.g., *People of Puerto Rico v. United States*, 134 F.2d 267 (C.A. 1, 1943) cert. den. 320 U.S. 753; *Public Water Supply District No. 3 v. United States*, 135 F.Supp. 887 (C.Cls. 1955). In view of the established nature of the law in this respect, the statement by the District Court was fully warranted that "Clearly, I think the district is not entitled to compensation for the loss of the right to assess the lands taken by the Government, and, indeed, the defendant

district does not appear seriously to so contend.” (Appendix, *infra*, p. 28).

Before leaving the *Aho* and *Florea* cases, it should be noted that they are to be further distinguished from the present case. It appears that in those cases the lands taken continued to benefit from operation of the drainage and diking facilities involved, which is not the circumstance here.¹³ Yet it was this feature which gave rise to the Oregon District Court’s conclusion that the Government ought to be estopped from denying liability (*Aho*, p. 366) and that an obligation running with the land continued concurrently with continuing benefits received (*Florea*, p. 376).

Neither the Columbia Irrigation District nor the State of Washington has a valid lien on the lands in Parcel II. Statutes of the State of Washington are comparable to those of the State of Idaho reviewed in the *Mullen* case. The bonds are refunding bonds

¹³ Cf. Br. 14 where even the appellants’ assertion is no stronger than that “* * * the Government, at least potentially, may benefit * * *” (emphasis added). As made clear in *Sharpe v. United States*, 112 Fed. 893, 897 (C.A. 3, 1902), affirmed 191 U.S. 341, “possibilities more or less remote” are not properly to be considered in this respect nor can testimony be “vague and speculative in character”. And, in any event, it is now established that neither potential liens nor unused benefits are compensable here. *Mullen Benevolent Corp v. United States*, 290 U.S. 89 (1933); *Yoknapatawpha Drainage Dist. No. 2 v. United States*, 242 F.2d 925, 927 (C.A. 5, 1957); *People of Puerto Rico v. United States*, 134 F.2d 267 (C.A. 1, 1943), cert. den. 320 U.S. 753; *People of Puerto Rico v. United States*, 131 F.2d 151 (C.A. 1, 1942), cert. den. 318 U.S. 775; *St. Louis v. Dyer*, 56 F.2d 842, 844 (C.A. 8, 1932); *United States v. 83.94 Acres of Land in Newport County, R. I.*, 65 F.Supp. 843, 848 (D. R.I. 1946).

in the instant case and as such are a lien upon the *property of the District only* (RCW 87.22.220; 87.16.090; Br. 9) and the statutes do not provide that they are liens with respect to lands in individual ownership. Since it is clear in the instant case that the United States acquired fee title to the lands in Parcel II from individuals who were former owners and that neither of the appellants had any title, either legal or equitable to any part of the lands described as Parcel II (R. 57, 58 as amended by stipulation dated Oct. 30, 1958, 73; Findings of Fact IV, V (R. 78)), it is clear that we are not here "dealing with an actual present lien, as contrasted to an inchoate lien" as the appellants would have it appear (Br. 9). All that either of the appellants had so far as Parcel II lands are concerned was the possibility of future assessments which might eventually become a lien. As has been shown the law is settled that such potential liens are not compensable here (*supra*, pp. 19, 20). It should be noted that even the appellants recognize that under circumstances such as here presented an "inchoate lien of a bondholder has no standing in law" (Br. 9).

Further analysis of Washington statutes and cases support these conclusions. Thus, as to the lien of assessments, the Washington code provides that the assessment upon real property shall be a lien against the property assessed, from the 1st day of January in the year in which it is levied (RCW 87.32.100). Obviously, the legislature has provided for annual assessments and vesting of liens. This being true, there would be no assessment liens on the property

purchased after all delinquent and current assessments were paid, unless the assessment of maximum benefits were a valid levy and assessment of such amount against the individual tracts of land, with provision for payment therefor. But there is no clear statutory provision for or direction to this effect. Special assessments are in derogation of the common law, and statutes so providing must be construed strictly as against liability other than such as is clearly expressed. *Mullen Benevolent Corp. v. United States*, 290 U.S. 89 (1933).

The bond obligation is a general corporate obligation for which all lands in the district are subject to assessment, except, of course, land owned by the United States which is not subject to assessment. *Mullen Benevolent Corp. v. United States*, 290 U.S. 89, 91 (1933). The individual landowner is not entitled to a segregation of his share of the obligation at the time it is created, or at a later time, since the act makes no provision for segregation. *Roberts v. Irrigation District*, 289 U.S. 71, 73 (1933) and authorities there cited.

Since there appears no vested lien upon lands in private ownership for the bonded indebtedness, there exists no liability as to lands in Parcel II. Congress has not provided for lands of the United States to become subject to assessment for the irrigation district in this instance. In the absence of an act of Congress allowing lands of the United States to become subject to assessment, it has been uniformly held that such lands are not liable for special assessments for local improvements. *Mullen Benevolent*

Corp. v. United States, 290 U.S. 89 (1933); *Lee v. Osceola Imp. Dist.*, 268 U.S. 643, 645-646 (1925); *United States v. Allegheny County*, 322 U.S. 174, 188-189 (1944); *Board of Directors v. Reconstruction Finance Corp.*, 170 F.2d 430, 431 (C.A. 8, 1948).

III

The District Court Was Warranted In Segregating The Issues Of Fact And Law As To Parcel II From Those Of Parcels I And III

The appellants would have it appear that the District Court committed reversible error in ruling that the issues of fact and law with respect to Parcel II could be segregated from those of Parcels I and III (E.g., Br. 4, 9-10). While what has been stated hereinbefore demonstrates the fallacy of appellants' contention, it is believed that the want of merit in it can be pointed up readily and briefly.

As has been shown (*supra*, pp. 13-18), this case clearly presents no true "severance damage" situation. Values of Parcel I and II are severable from the issues here presented, in that the claim of the appellants, based on loss of power to levy future assessments as to lands in Parcel II, is not a "severance damage" but simply amounts to a claim for business losses which, as the Supreme Court and other courts have made clear, are consequential and not compensable (authorities cited *supra*, pp. 19, 20). Thus considered, allegations of the appellants such as that the market value of remaining plant facilities and holdings of the Irrigation District have been depreciated by the taking; that the Irrigation Dis-

trict has no other sources of income available; that its facilities cannot be economically changed; and that additional lands are not available to replace Parcel II lands (E.g., Br. 2-3, 10), all become issues of fact immaterial to this proceeding. The Supreme Court has repeatedly stressed that "Frustration and appropriation are essentially different things." *Omnia Co. v. United States*, 261 U.S. 502, 513 (1923); *Mullen Benevolent Corp. v. United States*, 290 U.S. 89, 94-95 (1933); *United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 281-283 (1943). Since there was only a right of assessment so far as Parcel II lands are concerned, which right could not be exercised against government-owned lands, a judgment of no compensable damages to the appellants was properly entered so far as Parcel II is concerned.

If, as has been demonstrated herein, compensation cannot be allowed the Irrigation District or its bondholder under the theory of severance damages, it follows that the claims of the District as to Parcels I and III on the one hand, and on the other hand as to Parcel II, cannot be inter-related. Thus the District Court was warranted in considering the claims as to Parcel II separately and apart.

In view of the presentation of the appellants' case, a short quotation from the opinion of the United States Court of Appeals for the Eighth Circuit in *St. Louis v. Dyer*, 56 F.2d 842 (1932) becomes appropriate. There it is stated (p. 845):

Much has been said in brief and argument respecting the "natural equity and justice" of

appellant's claim. The trial court, keenly alive to this consideration in view of the great difficulties in the way of other relief, was, however, "unable to find any law to jump with my personal wishes in the case." * * *

In the instant case, while expressing some sympathy for the Irrigation District, the District Court recognized that the law was as contended by the United States. It is believed that this Court will come to the same conclusion.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the District Court should be affirmed.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General.

DALE M. GREEN,
*United States Attorney,
Spokane, Washington.*

RONALD R. HULL,
*Assistant United States Attorney,
Yakima, Washington.*

ROGER P. MARQUIS,
HAROLD S. HARRISON,
*Attorneys, Department of Justice,
Washington 25, D. C.*

APPENDIX

CHAMBERS OF
SAM M. DRIVER
UNITED STATES DISTRICT JUDGE
Spokane 10, Washington
December 11, 1956

Honorable William B. Bantz

United States Attorney
Post Office Building
Spokane 10, Washington

Attention: Mr. Ronald R. Hull
Ass't U. S. Attorney
222 Federal Building
Yakima, Washington

Mr. James Leavy, Attorney
P. O. Box 673
Pasco, Washington

Gentlemen:

Re: United States v. Columbia Irrigation District, et al.—No. 765 (So. Div.)

In the above case, the plaintiff, United States, is taking for public use certain lands described in the complaint. The action was instituted on December 23, 1952, and on March 18, 1953, the court entered an order giving the plaintiff the right to take possession of the premises to be acquired. There are three classes of real property involved which are separately listed in the complaint as Parcels I, II, and III. Parcels I and III consist of real property owned by the district and subject to lien rights of the State of Washington as holder of the district's bonds. Par-

cel II consists of privately owned land within the boundaries of the irrigation district previously acquired by purchase or by condemnation by plaintiff, United States.

On June 13, 1956, the plaintiff moved for summary judgment as to the property in Parcel II. The defendant irrigation district filed an affidavit resisting the motion. The court on the 9th day of October, 1956, entered an order denying the motion. As indicated by my comments when the motion was argued, I thought that factual issues had been raised by defendant irrigation district's affidavit which would prevent decision by summary judgment of the question whether the district has any compensable interest in Parcel II. At that time I expressed the opinion that the district did have such an interest. It seemed to me that the equities heavily favored the district and I may very well have been unduly influenced by that consideration. At any rate, I had misgivings which induced me to re-examine the question whether the district has any compensable interest in Parcel II. I have reread briefs of counsel and examined authorities cited, and I have come to the conclusion, reluctantly I must admit, that the district is not in law entitled to any compensation for the taking of the Parcel II lands. The conclusion is inescapable, I think, under *United States v. Honolulu Plantation Co.*, 9 Cir., 182 F. 2d 172. Judge Fee in his opinion for the court emphasizes the principle that an owner in a condemnation case may not recover so-called severance damage; that is to say, where less than the whole of a tract of land is taken, the diminution in value of the remainder by reason of the taking of the part, unless there is one fee ownership of the entire tract. Tract, of course, in this sense may mean

noncontiguous parcels of land, provided they are used as a unit in connection with a business or farming operation, or are capable of such use in the reasonably near future.

In this case, I can conceive of only two theories on which the irrigation district would be entitled to compensation; namely, 1) the loss of right to continue to assess the lands taken by the Government after the taking; or, 2) so-called severance damage—that is to say, the reduction in value of the irrigation plant and system resulting from the taking of the privately owned Parcel II lands. Clearly, I think the district is not entitled to compensation for the loss of the right to assess the lands taken by the Government, and, indeed, the defendant district does not appear seriously to so contend. The District is not entitled to so-called severance damage by the clearly stated principles announced in the Honolulu Plantation Company case. The cases on which defendant district relies are either district court decisions, or are factually distinguishable. The case of *Baetjer v. United States*, 1 Cir., 143 F.2d 391, I think, is distinguishable, as pointed out on page 6 of the plaintiff's memorandum of authorities. Even if there were a conflict between that case and the Honolulu Plantation case, decided by the Ninth Circuit, the latter would govern.

I have carefully reexamined the opposition affidavit, and feel that it raises only one issue of fact which would prevent deciding the question as to Parcel II on the motion for summary judgment. There are circumstances related which would probably raise the issue of estoppel as to an individual, or a private corporation, but when it acts in its sovereign capacity to acquire private property for public use, the Gov-

ernment ordinarily is not subject to estoppel because of the acts or omissions of its officers and agents. But it is stated on page 5 of the affidavit, on information and belief, that, a contractual agreement was reached between the irrigation district and the Government under which the plaintiff agreed to pay, and is obligated to pay, the district \$149,000 for all of the lands involved in the action. I seem to recall that Mr. Hull in a conference which he had in Walla Walla in open court, made the statement that the contract which had been drafted and apparently signed by the officers of the irrigation district, had never been signed by any representative or agent of the United States, and hence had never ripened into a completed contract. However, I do not have the court reporter's transcription of the proceedings at Walla Walla, and there is nothing in the file on which I could make a factual assumption, based on Mr. Hull's statement. If the plaintiff's counsel desire me to reconsider the matter of summary judgment, and it is a fact that the contract was never signed on behalf of the Government, it seems to me that an affidavit to that effect in support of the motion for summary judgment would be sufficient to dispose of the apparent factual issue on that point.

It is my view, also, that Parcel II lands present an entirely different question from the lands in Parcels I and III, and that the court could have a separate hearing or trial as to Parcel II. The plaintiff, in accordance with its customary practice, has endorsed on the complaint a demand for jury trial on the issue of just compensation. The issue with which the court is immediately concerned as to Parcel II, is not the amount of compensation that should be awarded to the owner of the property, but, whether the de-

fendant irrigation district has any compensable interest therein at all. That issue, I think, should be decided by the court without a jury, as Condemnation Rule 71A provides for a trial by jury as to the issue of just compensation only.

On examining the files in this case, I can find no declaration of taking, and no evidence that any deposit has been made into the registry of the court covering the estimated value of the property to be acquired. As stated above, the plaintiff has taken possession under an order of the court, but the title and ownership of these lands have at all times remained in defendant district, although the district has been denied any beneficial use of them, at least since the order of possession was entered in March, 1953. This would seem to place the district in an unfair, disadvantageous position, particularly as to the matter of carrying any appeal to the Ninth Circuit Court of Appeals on an adverse decision as to Parcel II lands. Frankly, I think that in all fairness, the Government should promptly, with or without filing a declaration of taking, deposit into the registry of the court an amount estimated in good faith to represent just compensation for the property in Parcels I and III. In that connection, I call attention to Civil Rule 71A (j), which in part provides that, the plaintiff shall deposit with the court any money required by law as a condition to exercise of eminent domain and, although not so required, may make a deposit when permitted by statute.

If it does not prove to be possible to set up the facts without dispute, so that the question as to Parcel II may be decided on summary judgment, then I propose to have a separate trial and hearing as to that parcel before the court without a jury. I should

welcome an expression by counsel as to whether they would prefer that such hearing be held before, after, or at the same time as the jury trial to determine just compensation as to Parcels I and III. I should think no extended trial would be necessary as to Parcel II. It should be possible to stipulate that the district does not own any fee simple, or other direct property interest in the lands of Parcel II, and that no enforceable contract for compensation has been entered into between the district and the United States, if that is the fact. To support its position, the defendant district could then make its offer of proof along the lines set out in the affidavit submitted on summary judgment, without the necessity of calling witnesses. If the Government does not see fit to make a deposit of estimated value (have in mind that a high percentage could then be withdrawn by the district on order of the court without prejudice), I would be inclined to defer passing upon the question presented by Parcel II, if the district so desires, until there has been a jury trial on Parcels I and III, and the award of compensation has been determined and paid into court.

I shall await your response to this letter before taking further action in this case.

Yours very truly,

/s/ SAM M. DRIVER

United States District Judge

SMD/b

cc- Attorney General

Attention: E. P. Donnelly, Assistant

Clerk, U. S. District Court

No. 16,048 ✓

**United States Court of Appeals
For the Ninth Circuit**

RALPH GEISE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the District Court for the
District of Alaska, Third Division.**

BRIEF FOR APPELLEE.

WILLIAM T. PLUMMER,

United States Attorney,

GEORGE F. BONEY,

Assistant United States Attorney,

Anchorage, Alaska,

Attorneys for Appellee.

FILED

SEP 11 1958

PAUL P. O'BRIEN, CLERK

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No. 16,048

United States Court of Appeals For the Ninth Circuit

RALPH GEISE,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

On Appeal from the District Court for the
District of Alaska, Third Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant was convicted after a jury trial in the District Court, for the District of Alaska, Third Judicial Division at Anchorage, Alaska, of the crime of Statutory Rape, (65-4-12 ACLA 1949.) The court imposed the sentence of imprisonment for the period of appellant's natural life, said sentence to commence and begin on the 28th day of April, 1950. Jurisdiction below was conferred by 48 USCA 101 and 28 USCA 2255. Jurisdiction in this court is conferred by 28 USCA 1291.

STATEMENT OF FACT.

Appellant was indicted for the crime of Statutory Rape, a violation of Section 65-4-12 ACLA 1949

(R-33). Trial was held in the District Court for the District of Alaska, Third Judicial Division at Anchorage, Alaska, and on April 28th, upon a jury's verdict of guilty, appellant was given a sentence of imprisonment for the period of his natural life (R-34). It appears that the appellant is still serving this term as an inmate of the Federal Penitentiary at McNeil Island, Washington (R-17).

The District Court appointed attorney William H. Olsen of the Anchorage Bar to represent the appellant (R-8).

At the trial, after the jury had been selected, but before any evidence was offered, the prosecutor moved the court for an order removing spectators from the trial (R-15). The court, pursuant to the motion made by the prosecutor, ordered all spectators or members of the audience, except members of the press, members of the bar, relatives and close friends of the defendant and of the prosecuting witness, or any other witness under age, and witnesses generally, excluded from the courtroom (R-16).

The original file of the clerk of the court has been sent forward to this honorable court and without resort to the original file of the clerk, there is nothing presently available to enable appellee to ascertain whether or not the appellant and his counsel did, as a matter of fact, object at the time it was given to instruction in No. 5 of the trial judge's charge to the jury. In any event, the instruction as set forth on page 3 of the appellant's brief is in error and does not include the entire instruction as given by the trial

judge. Attorney for the appellant is also guilty of another error on page 3 in his brief where he alleges that the parties are filing herein a stipulation concerning the giving of the foregoing jury instruction since no stipulation has been entered, or will be entered.

Following his conviction and sentence, the appellant moved the court for a new trial upon the grounds that the court erred in granting the government's motion to exclude the public from the trial of the case (R-16). This motion was denied by the trial judge on July 27, 1950 (R-16, 17).

On August 5, 1950, appellant petitioned the District Court for leave to appeal *in forma pauperis*, stating as grounds for the appeal that the trial judge erred in excluding the public from the trial of the case and erred in charging the jury on the presumption of innocence in instruction No. 5 (R-3). Permission to proceed in the prosecution of the appeal *in forma pauperis* was denied by the trial court on August 11, 1950 (R-17).

In 1951 the appellant applied to this court for leave to appeal *in forma pauperis* and in an order filed on May 24, 1951, the application was denied (R-4).

A motion to vacate and set aside appellant's sentence under 28 USCA 2255 was filed in the District Court on January 3, 1958 (R-5). See *United States v. Geise*, 158 F. Supp. 821 (1958). This motion was denied by the District Court on April 9, 1958 (R-25-29). From the order denying the motion to vacate the sentence the present appeal is taken.

ARGUMENT.

- I. **THE EXCLUSIONARY ORDER OF THE TRIAL JUDGE WAS NOT SO BROAD UNDER THE CIRCUMSTANCES, AS TO VIOLATE THE RIGHT OF PUBLIC TRIAL GUARANTEED BY THE SIXTH AMENDMENT.**

The exclusionary order complained of is found in the record on page 16. It reads as follows:

“ . . . All spectators or members of the audience except members of the press, members of the bar, relatives and close friends of the defendant, and of the prosecuting witness or any other witness under age, and witnesses generally, are excluded from the court room.”

As was pointed out by this court in the case of *Reagan v. United States*, 202 Fed. 488 (9th Cir. 1913), there is no provision of the Code of Alaska guaranteeing to the defendant in a criminal case the right to a public trial. The right of the accused to demand a public trial is found in the Sixth Amendment to the Constitution, which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. The term “public trial” is a relative term and as was pointed out in *Reagan v. United States, supra*, the trial was not by the exclusionary order rendered a secret trial, it was still a public trial by the terms of the exclusionary order as members of the press, members of the bar, relatives and close friends of the defendant, and of the prosecuting witness and others were admitted into the courtroom. This constituted a sufficient number of the public to see that the accused was fairly dealt with and not unjustly condemned. In accord is *Callahan v. United States*, 240 Fed. 683 (9th Cir. 1917).

Appellee cites with approval *Davis v. United States*, 247 Fed. 394 (8th Cir. 1917). In this case the witnesses were not of tender age nor was it a statutory rape case. The defendants were being held and tried in connection with a train robbery. Except for the possible tumultuous and disorderly conduct of the spectators there would appear to be no reason why the public should have been excluded in the *Davis* case. In the present case, however, the trial judge gave his reasons prior to making the exclusionary order (R-16) when he advised that

“... I think that in view of the tender years of the prosecuting witness and other one of the witnesses referred to by the United States Attorney and the difficulty of obtaining testimony from them before a large audience I think it would be in the furtherance of justice to grant the motion, and therefore the Court grants the motion. . . .”

Certainly the trial judge in view of the *Reagan* and *Callahan* decisions was then in excellent position to ascertain the most prudent course to be followed so that justice would prevail in the case and having done so, his decision should not now be overruled.

The appellant also cites the case of *Tanksley v. United States*, 145 F. 2d 58 (9th Cir. 1944). The court in this excellent opinion written by Judge Denman did not consider the problem raised by this appeal. As a matter of fact on page 60, Judge Denman specifically said that the problem was not considered when he stated:

“It is not necessary to consider whether there is discretionary power in the trial court to exclude

from the courtroom minor children, . . . or persons actually disturbing the proceedings, . . . or those likely to create a disturbance, . . . or adults in cases in which, as the trial progresses, facts are developed of pathologic and revolting perversion. Assuming there may be such discretion, the trial court erred in assuming the power of exclusion here exercised at this trial on the charge of rape of an adult woman.”

The appellant also cites the case of *United States v. Kobli*, 172 F. 2d 919 (3rd Cir. 1948). This again, like the *Tanksley* case referred to above, does not reach the question presented by the present case and as a matter of fact, the court specifically pointed out on page 923 that they were not ruling on this question when they said:

“ . . . In reaching our conclusion we are, of course, not passing upon the different situation which arises in a case, such as a prosecution for statutory rape, in which the prosecuting witness is of such tender years as to be seriously embarrassed when giving her testimony by the presence of spectators not concerned with the trial. It has been held that in such a case the trial Judge in order to prevent a miscarriage of justice may, during the witness’ testimony, exclude all members of the public not directly concerned with the trial.”

In all cases cited by both the appellant and the appellee all courts have recognized a limitation of some nature in the right of all members of the public to be in attendance at all phases of all criminal trials. The courts in the cases have some times based this

upon one factor or another but all the authorities cited indicate that in some cases, under proper conditions, there can be exclusionary orders and that if such exclusionary orders are based on valid reasons the discretion exercised by the trial judge should not be overruled. Here the trial judge, prior to making the exclusionary order, explained why he felt such an order was necessary in furtherance of the ends of justice and certainly based on the *Reagan* and *Callahan* cases, his exercise of discretion was a proper one and the exclusionary order was not too broad.

II. THE DISTRICT COURT DID NOT ERR IN ITS INSTRUCTION TO THE JURY ON THE PRESUMPTION OF INNOCENCE.

Appellant did not include this point in his statement of points and designation of the record on appeal (R-31, 32). It further appears that the appellant by his action has precluded a consideration of this possibility because Rule 30 of the Federal Rules of Criminal Procedure provides that:

“ . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict stating distinctly the manner to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.”

Where the appellant did not object to an instruction when given, no error may be assigned on appeal. See *Grant v. United States*, 255 F. 2d 341, 342 (6th Cir. 1958).

This was not assigned as an error in the transcript of record designated by the appellant. It would further appear that there is not sufficient information by way of the appellant's designation of record before the court so that the court can ascertain from the record whether or not the appellant objected at the time the instruction was given; if he did object, the basis for his objection and the grounds of his objection. This would appear to preclude the court from a consideration of this matter on the information available in the record before the court. As a matter of fact, there is no place in the record or even in appellant's brief where the instruction as given is set forth in its entirety. If the court does have sufficient information to consider this instruction to the jury on the presumption of innocence, it would further appear that this matter is not properly before the court for consideration at this time. See *Thiel v. Southern Pac. Co.*, 169 F. 2d 30, 32 (9th Cir. 1948); *Bennett v. Scofield*, 170 F. 2d 887, 889 (5th Cir. 1948); *St. Louis-San Francisco Ry. Co. v. Willingham*, 177 F. 2d 167, 171 (8th Cir. 1949); *Queen Insurance Company v. Larson*, 225 F. 2d 46, 50 (9th Cir. 1955); *Griffin v. Ensign*, 234 F. 2d 307, 316 (3rd Cir. 1956); *Watson v. Button*, 235 F. 2d 235, 237 (9th Cir. 1956).

This is an appeal from a denial of the request to vacate and set aside the judgment of the lower court under Title 28, USCA Sec. 2255, (R-29) and this issue was not presented to the trial court. The cases are legion that a proceeding under Title 28, Section 2255, if the issue was not presented to the trial court, it cannot, for the first time, be raised in the appellate

court. See *Waley v. United States*, 233 F. 2d 804 (9th Cir. 1956); *Walker v. United States*, 218 F. 2d 80 (7th Cir. 1955); *Hornbrook v. United States*, 216 F. 2d 112 (5th Cir. 1954).

Notwithstanding the fact that the appellant did not designate this instruction and the objections thereto, if any, in the designation for record on appeal and notwithstanding that there is not sufficient information before the court to enable the court to consider it at this time, if the court does consider the matter, it is respectfully submitted that on the facts the appropriate decision is not to be found in *Reynolds v. United States*, 238 F. 2d 460 (9th Cir. 1956), but the proper consideration to be given is found in the case of *Shaw v. United States*, 244 F. 2d 930 (9th Cir. 1957), where the court advised:

“That we are not bound to reverse every case where instructions may have been given notwithstanding the obvious guilt of the defendant and the overwhelming weight of facts which are not even contested.”

It is respectfully submitted on the facts that the present case is more like the *Shaw* case than the *Reynolds* case, and if it is considered on the merits the court should sustain the trial judge. Moreover, when the instruction is read in its full context, it will be found to be far less objectionable than the one found in the *Reynolds* case.

**III. THIS COURT HAS CONSIDERED ON A PRIOR OCCASION
THE PETITION OF THE APPELLANT TO APPEAL IN FORMA
PAUPERIS AND DENIED THE SAME (R-4).**

The appellant in his brief does not argue the third and fourth specifications of errors set out on page 6 of the brief. It is the contention of the appellee that since this court has already considered this matter before that it would not be proper to reconsider it at this time.

**IV. UNDER THE CIRCUMSTANCES OF THIS CASE, THE COURT
SHOULD NOT CONSIDER THE QUESTIONS OF RIGHT OF
PUBLIC TRIAL AND PRESUMPTION OF INNOCENCE AS
RAISED BY THIS PROCEEDING.**

It is the position of the appellee that the appellant is attempting, by this proceeding, to do what the cases say he cannot do. He is attempting to use this proceeding as a substitute for an appeal from his original conviction. This he cannot do. See *Burdix v. United States*, 231 F. 2d 893 (9th Cir. 1956); *Hickman v. United States*, 246 F. 2d 178 (8th Cir. 1957); *Davis v. United States*, 214 F. 2d 594 (7th Cir. 1954); *United States v. Trumblay*, 234 F. 2d 273 (7th Cir. 1956). It is the contention of the appellee that the case should not have been considered on its merits in a proceeding under Title 28, Section 2255 by the trial court. The trial court did, however, consider the matter on its merits regardless of the stated rule that Title 28, Section 2255 is no substitute for appeal (R-26).

If the trial court properly considered the matter on its merits under the motion, as the supplemental

opinion of the honorable judge Hodge indicates, and the trial court based on this consideration, denied the defendant's motion, then this honorable court should consider this matter on its merits as to the issues raised in the trial court, which do not include the issues raised under point B of the appellant's brief, namely, that the court erred in its instructions to the jury on the presumption of innocence and this should not, in any event, be considered on appeal.

CONCLUSION.

The exclusionary order of trial judge was not so broad as to violate the Sixth Amendment of the Constitution under the circumstances. Even if it were, this was a proper matter of appeal by the appellant rather than a proceeding of this nature and should not be considered by this court. As to the alleged error on the instruction on the presumption of innocence, this is not properly before the court for the following reasons: It was not properly designated as an error at the proper time by the appellant. There is insufficient designation of the record to determine the exact nature of the instruction and whether an objection was made at the time of trial. Furthermore, this error was not raised in this proceeding below and cannot now be considered by this court. Even if this court did consider the record in its full context on its own motion, it would find that the instruction in its full context was correct or that the error was harmless in the light of the whole record. The abuse of

discretion alleged by the appellant in the trial court denying an appeal *in forma pauperis* is a frivolous designation of error since this matter has once been decided by this court. Therefore, the decision of the lower court should be affirmed and the appellant afforded no relief.

Dated, Anchorage, Alaska,
September 5, 1958.

Respectfully submitted,

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